Supreme Court, U.S.
FILED

03 9 JUN 30 2003

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In the Supreme Court of the United States

WILLIAM G. CABRERA,
PETITIONER,

Petitioner,

v.

CHARLES L. HINSLEY,
RESPONDENT.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Stone v. Powell*, 428 U.S. 465, 494 (1976), this Court held that habeas corpus relief is not available to remedy a violation of the Fourth Amendment, if the State has provided "an opportunity for full and fair litigation of the Fourth Amendment claim." Citing conflicting standards developed in various circuits, the court below noted that this Court's ruling in *Stone* has "caused considerable consternation over what exactly 'full and fair' means." The court termed irrelevant in Fourth Amendment cases the standards for gauging fair state-court proceedings added to the federal habeas statute by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2284(d). The court concluded that habeas relief must be denied in all Fourth Amendment cases as long as the state proceeding was not a "sham," no matter how "egregious" the state courts' failure to honor the Fourth Amendment. The following questions are presented:

(1) Should the Court resolve the conflict over the standard for implementing the "full and fair litigation" test of *Stone v. Powell* and decide that a state prisoner does not have to establish that the proceedings in the State courts were a "sham" before he is entitled to have a federal habeas court address an "egregious" Fourth Amendment violation?

(2) Are the grounds for obtaining habeas corpus as limited by the Antiterrorism and Effective Death Penalty Act relevant in determining whether a state prisoner has received "full and fair" litigation of his Fourth Amendment claim in the state courts?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William G. Cabrera respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's grant of the petition for habeas corpus (App., *infra*, 1a-12a) is reported at 324 F.3d 527. The opinion of the district court granting the petition for habeas corpus (App., *infra*, 13a-43a) is reported at 172 F.Supp.2d 966.

The opinion of the Supreme Court of Illinois on direct appeal (App., *infra*, 44a-71a) is reported at 116 Ill.2d 474. The opinion of the Appellate Court of Illinois on direct appeal (App., *infra*, 72a-81a) is reported at 134 Ill.App.3d 526. The ruling of the Circuit Court of Illinois upholding Mr. Cabrera's warrantless at-home arrest (App., *infra*, 82a-90a) is unreported.

JURISDICTION

The judgment of the court of appeals was duly entered on March 31, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

A. The Underlying Facts

On February 12, 1981, police found the body of Yoel A. Keena in a back room of the Assyrian National Foundation. (App., *infra*, 44a). The police subsequently learned that some of the victim's traveler's checks were used the day after the homicide to make purchases at the "Different Circle" clothing store in the Century Mall in Chicago. (App., *infra*, 45a).

A week later, the police interviewed the assistant manager of the store, who remembered that a group of three men had come into the store on the day after the homicide, and that one of the men made purchases with the victim's traveler's checks. *Ibid.* Several days after the interview, the assistant manager went to the police station and identified from mug shots 18-year old William Cabrera, the petitioner, as one of the three men who had come into the store. *See id.*

Armed only with this information, the police proceeded to Mr. Cabrera's apartment with the intention of *arresting* him. The officers neither sought nor obtained an arrest warrant. *Ibid.*

Mr. Cabrera was not at home. The police asked the clerk-receptionist at the apartment house to inform them when Mr. Cabrera returned. *See id.* No stakeout was posted to keep watch over Mr. Cabrera's possible return to the apartment. (App., *infra*, 46a).

The police made no effort to procure an arrest warrant after that initial visit. The next day, the receptionist from Mr. Cabrera's building called the police at around 5:30 p.m. to say that Mr. Cabrera was at the apartment. *Ibid.* Later that evening the police returned to Mr. Cabrera's apartment. *See id.* The lead detective testified that, when his team went back to the apartment, it was still their intent to *arrest* Mr. Cabrera without a warrant. *Ibid.*

When the police knocked on Mr. Cabrera's door, he came to the door "wearing only gym shorts and looking as though he had just taken a bath or a shower." *Ibid.* The police immediately placed Mr. Cabrera under arrest, advising him that he had been "identified as cashing the checks or utilizing the taken travelers checks." *Ibid.*

The police gave Mr. Cabrera *Miranda* warnings. Although they lacked either an arrest warrant or a search warrant, the police searched his apartment, but they found nothing to incriminate him.

Mr. Cabrera was then brought to the station house and placed in a windowless room with just a table and three chairs. (Ill. Trial Ct. Rec. 160-61). The officers locked the door to prevent him from leaving. (Ill. Trial Ct. Rec. 167). With two exceptions (to force him to accompany the detectives when they went to search another suspect's home and to subject him to an uncounseled polygraph test), Mr. Cabrera was locked up for more than 37 consecutive hours. (Ill. Trial Ct. Rec. 425).

Throughout his detention, Mr. Cabrera was never taken to a telephone to contact a relative or an attorney. (Ill. Trial Ct. Rec. 421). Throughout his detention, the officers never told him when or whether he would be released.

For approximately the last 14 hours of his 37-hour ordeal, Mr. Cabrera was handcuffed to a ring on the wall. (Ill. Trial Ct. Rec. 602-03). *Cf. Hope v. Pelzer*, 122 S. Ct. 2508, 2513-15 (2002) (Alabama corrections officers violated Eighth Amendment by handcuffing inmate to hitching post for seven hours, during which time they denied him bathroom breaks, gave him limited amounts of water and taunted him). In his 37-hour detention, he was fed three sandwiches. (Ill. Trial Ct. Rec. 191-92, 197 & 594).

Although the police testified that Mr. Cabrera told them that he had slept, none of the persons who looked in on him

throughout the 37-hour detention could testify that they saw this happen. (Ill. Trial Ct. Rec. 431). The room had neither a cot nor a bed, and Mr. Cabrera was handcuffed to the wall for the last 14 hours. (Ill. Trial Ct. Rec. 176-77 & 428-31).

Finally, on February 26 between 2:30 a.m. and 3:15 a.m.—approximately 34 hours into his confinement to the room—Mr. Cabrera gave a statement that he and a friend had broken into the Foundation offices and that he had seen his companion strike the victim twice when they discovered him inside the offices. (App., *infra*, 48a). Almost three hours later, at about 5:40 a.m., a court reporter took his statement. (Ill. Trial Ct. Rec. 404).

B. The Illinois Proceedings

Mr. Cabrera subsequently retracted his statement and argued that his warrantless arrest and confinement violated the Fourth Amendment and that the incriminating statements he made while in unlawful detention had to be suppressed. In rejecting his Fourth Amendment claim, the Illinois court system, at each of its three levels, relied on a different ground. Each of the appellate courts recognized that the justification on which the court below had relied could not be sustained. The State Supreme Court eventually came up with a new justification for the warrantless arrest that was equally baseless.

1. The trial court believed that the police had probable cause to arrest Mr. Cabrera, because the court "found" that Mr. Cabrera had been in possession of the victim's traveler's checks:

> "The salesman made a photo[]identification of [Mr. Cabrera] as being the person that passed the Traveler's checks belonging to the deceased on 2-23-81 and told the police that the picture was the same but the person that actually passed the checks had a big scar on his neck. . . . [Upon finding Mr. Cabrera at the apartment, t]he police observed a scar on his

> neck and arrested the Defendant without a warrant. Clearly probably [sic] cause for the arrest of the Defendant was present." (App., *infra*, 84a).

The trial court's "facts," however, squarely and irreconcilably contradicted the store manager's undisputed testimony that: (1) Mr. Cabrera was not the person who used the traveler's checks to pay for any purchases, and (2) that Mr. Cabrera was not even at the counter at the time of the purchase. (App., *infra*, 45a).

In fact, the State later confirmed before the Illinois Supreme Court that the trial court's factual findings had been flatly wrong and that Mr. Cabrera did not have the traveler's checks:

> "[The assistant manager] testified at trial that the defendant came into his store with two other men, and that [Mr. Cabrera] browsed through clothing while one of the other two made the purchase at issue. [The store manager's] testimony has been accepted by the State as an accurate account; *thus the State now agrees that prior to the defendant's arrest there was no reason to believe that he had made a purchase with, or engaged in a transaction concerning, the victim's check.*" (App., *infra*, 65a) (Simon, J., *dissenting*) (emphasis added).

After the trial court refused to suppress the confession extracted after the unlawful arrest, a jury found Mr. Cabrera guilty of felony-murder, robbery and burglary. (App., *infra*, 72a).

2. On appeal, the Illinois Appellate Court tacitly rejected the facts supporting the trial court's erroneous probable-cause determination. In its decision, the Appellate Court blurred the identity of the individuals who had the deceased's traveler's checks. (App., *infra*, 73a (referring ambiguously to the "men who had used the checks"); App, *infra*, at 1174

(Mr. Cabrera was "one of the three individuals who purchased clothes and paid for them with the victim's traveler's checks")).

The Appellate Court instead adopted a different view of the facts—namely, that the police had *actual* knowledge of Mr. Cabrera's prior criminal record, and that this purported knowledge of Mr. Cabrera's criminal record furnished probable cause to arrest him for this crime:

> "[H]ere, the arresting officers had more facts available to them than that defendant was merely present with another suspect. In the present case, *the officers knew* that defendant had been twice convicted of burglary in the past 6 months. Moreover, *they knew* defendant's past burglaries had occurred in the same general area as the murder and burglary they were investigating, and that defendant lived in the general area where the murder and burglary occurred." (App., *infra*, 78a (emphasis added)).

3. The detectives' supposed knowledge of Mr. Cabrera's criminal history, however, was found nowhere in the record. The State again had to concede before the Illinois Supreme Court that the record was bereft of support for the Appellate Court's "findings," just as the record did not support the trial judge's "finding." (App., *infra*, 63a (Simon, J., dissenting) (noting "State's admission during oral argument . . . that 'it is not in the record what police officer[s] actually knew at the time [they] arrested the defendant'")).

When this defect in the Appellate Court's decision was conceded, the Illinois Supreme Court abandoned the "facts," on which the two lower courts had relied as justifying Mr. Cabrera's warrantless arrest. Nonetheless, the Illinois Supreme Court affirmed. It held that the lower courts' rulings on probable cause could be sustained on the *likelihood* that the officers *must have* made investigations which "certainly would have" led to discovering Mr. Cabrera's record and that

the information the court assumed they must have obtained would have sufficed to furnish probable cause to arrest petitioner for the crimes at the Foundation offices:

> "[The investigating officers] *certainly would have* examined the Chicago police department records of the defendant. At the time of the defendant's arrest, *it must be reasonably concluded* that the detectives . . . ascertained the information appearing in the Chicago police department records regarding the defendant." (App., *infra*, 53a (emphasis added)).

On this hypothesis, and over a dissent, the Illinois Supreme Court declared that the police must have had sufficient information to constitute probable cause. Mr. Cabrera's subsequent state-court petition for post-conviction relief was also unsuccessful. (App., *infra*, 16a).

C. Habeas Proceedings Below

1. Mr. Cabrera later sought habeas relief from the United States District Court for the Northern District of Illinois. The Warden argued before the district court that *Stone v. Powell*, 428 U.S. 465 (1976) barred habeas review of Mr. Cabrera's Fourth Amendment claims. The district court, however, disagreed.

The Illinois Supreme Court had held that it "must be reasonably concluded" that the police would have known of Mr. Cabrera's criminal history before proceeding to arrest him. (App., *infra*, 54a). The district court noted, however, that "*nothing* in the record showed that the police were aware of [Mr. Cabrera]'s criminal history at the time they went to his home to arrest him." (App., *infra*, 33a). Specifically, "no one testified that the police ever looked up [Mr. Cabrera's] police record. . . . nor even that it was standard procedure to do so." (App., *infra*, 35a).

Moreover, as the district court observed, the Illinois Supreme Court's holding that it "must be reasonably con-

cluded" that the police must have known of Mr. Cabrera's criminal history prior to the arrest would have been constitutionally insufficient to supply probable cause for his arrest. The Illinois court's assumption directly contradicts this Court's decision in *Beck v. Ohio*, 379 U.S. 89, 97 (1964) (officer's knowledge of suspect's "previous record" coupled with his physical description could not establish probable cause: "to hold that knowledge of either or both of these facts constitutes probable cause would be to hold that anyone with a previous criminal record could be arrested at will"). Thus, the district court correctly concluded:

> "The 'record' cannot be understood to include plausible assumptions. It might be plausible to assume that a burglar with an extensive record would be known to every member of a small-town police department, but for a court to make that kind of assumption in the absence of testimony would derogate the Fourth Amendment." (App., *infra*, 37a).

Accordingly, the district court held the convictions to be unconstitutionally defective, because they rested largely on Mr. Cabrera's own incriminating statements, which were the product of an unlawful arrest. *See Wong Sun v. United States*, 371 U.S. 407, 485 (1963) ("[V]erbal evidence which derives . . . immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."); *see also Brown v. Illinois*, 422 U.S. 590, 603 (1975) ("Miranda warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession."); *Kaupp v. Texas*, 123 S. Ct. 1843, 1847-48 (2003) (per curiam) (suppressing suspect's confession obtained after an arrest made without probable cause). The court granted the writ conditioned upon Mr.

Cabrera's release from an unrelated life sentence. The State appealed.

2. On appeal, the United States Court of Appeals for the Seventh Circuit reversed. The court held that it did not have to consider whether the state court proceedings failed to satisfy the standards that Congress imposed with the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, Title I, § 104(3), 110 Stat. 1218 (1996), which amended 28 U.S.C. § 2254(d) and generally restricted federal habeas corpus relief. Instead, the court focused exclusively on its view of the "full and fair litigation" test of *Stone*. The court ruled that Mr. Cabrera did have an opportunity for "full and fair" litigation of his Fourth Amendment claims because he had "raised the issue in a suppression hearing prior to trial; the Illinois Appellate Court and the Illinois Supreme Court also considered the issue." (App., *infra*, 7a).

Despite the fact that the State conceded that the Illinois trial court's ruling contradicted undisputed testimony in the record, and that the different set of "facts" on which the appellate courts had relied lacked any basis in the record, the Seventh Circuit declared that "[t]here is no indication that these [state] courts were careless of Cabrera's *right to present his claim*." *Ibid.* (emphasis added). *Compare id.* with App, *infra*, 65a-66a (State conceding errors made in the Illinois trial and intermediate appellate courts) (Simon, J., dissenting).

For the court below, the original opportunity to "present" the Fourth Amendment claim was enough to bar federal habeas review. The court noted that the circuits are manifestly confused about "what exactly 'full and fair' means" under *Stone*. (App., *infra*, 5a). In the eyes of the Seventh Circuit, it means nothing more than that the process for submitting Fourth Amendment claims to the state courts was not a "sham," such as when the trial judge was "sleepwalking" or "bribed." (App., *infra*, 6a).

Moreover, the court held that, as it understands this Court's decision in *Stone*, "[a]bsent a subversion of the hearing process, we will not examine whether the judge got the decision right," and "[e]ven an egregious error" in refusing to honor a valid Fourth Amendment claim "would not by itself justify habeas relief." (App., *infra*, 5a). Thus, the court declined to consider whether the Illinois Supreme Court's refusal to comply with this Court's holding in *Beck*, coupled with the errors from the lower state courts, may have deprived Mr. Cabrera of an opportunity for full and fair review.

REASONS FOR GRANTING THE PETITION

I. THE STANDARD ADOPTED BY THE SEVENTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISION IN *STONE*.

A. *Stone v. Powell* does not justify a standard that compels a federal habeas court to ignore an "egregious" violation of the Fourth Amendment unless the prisoner shows that the state process was merely a "sham."

In *Stone v. Powell*, this Court held that a state prisoner may not be granted habeas corpus relief under the Fourth Amendment "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim." 428 U.S. at 494. The Court did not expand upon the meaning of "an opportunity for full and fair litigation." Rather, the only guidance given for the meaning of this expression is a citation to *Townsend v. Sain*, 372 U.S. 293 (1963), which appears in a footnote with no explanation beyond a "*cf.*" signal.

The citation to *Townsend*, however, was not carelessly thrown in. In *Townsend*, the district court was asked to hold an evidentiary hearing to determine whether the defendant's confession should have been suppressed. This Court held that a habeas court must hold an evidentiary hearing if the habeas applicant "did not receive a full and fair evidentiary

hearing in a state court." *Id.* at 312. Specifically, this Court identified six circumstances under which "a full and fair evidentiary hearing" had not been granted. *See id.* at 314. These circumstances include instances where:

> "(1) the merits of the factual dispute were not resolved in the state hearing;
>
> (2) *the state factual determination is not fairly supported by the record as a whole*;
>
> (3) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;
>
> (4) there is a substantial allegation of newly discovered evidence;
>
> (5) *the material facts were not adequately developed at the state-court hearing*; or
>
> (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

Id. at 313. (formatting altered and emphasis added).

If these inquiries suggested by *Townsend* properly determine whether there has been an opportunity for a "full and fair" litigation of a Fourth Amendment claim under *Stone*, then the Seventh Circuit's "sham" test is unacceptably stringent. As the district court here found, without contradiction from the court of appeals, the state courts' "factual determinations" underpinning the rejection of Mr. Cabrera's Fourth Amendment claims were not "fairly supported by the record." *Ibid.* Moreover, to the extent that the State purports to justify the warrantless arrest on the theory that the investigating officers may have relied on knowledge of Mr. Cabrera's prior criminal history, those "material facts"—if they were facts at all—were not "adequately developed at the state court hearing." *Ibid.*

Despite this Court's deliberate citation to *Townsend* in *Stone* as offering guidance for the "full and fair litigation" test, the Seventh Circuit offhandedly dismissed the relevance of *Townsend*, stating:

> "The only help in *Stone* is a footnote to a prior case: 'Cf. *Townsend v. Sain*, 372 U.S. 293 (1963).' And of course the value, generally, of 'Cf.' citations is often only revealed in the eye of the beholder." (App., *infra*, 5a (emphasis added)).

No further mention of *Townsend* or its required inquiries is made in the Seventh Circuit's decision.

Although it may be true that the value of "cf." citations is only revealed in the eye of the beholder, the six Justices who joined *Stone* must have intended their citation to *Townsend* to merit more consideration than a back-of-the-hand dismissal. It is equally certain that the majority in *Stone* did not contemplate that deprivations of opportunities for "full and fair litigation" would be limited to wildly improbable scenarios such as state courts deciding "that probable cause is not required in Illinois" or state judges conducting the Fourth Amendment analysis while "sleepwalking." (App., *infra*, 6a). That test, now adopted by the Seventh Circuit, conflicts with what this Court intended in *Stone*.

In contrast, the district court diligently and correctly applied *Stone* through the lens of *Townsend*, finding that Mr. Cabrera did not have "an opportunity for full and fair litigation" when the state courts' ruling on his Fourth Amendment claim consisted of an assumption concerning police practices that was improper and untethered to any facts in the record.

B. The aims and purposes of the *Stone* bar are not advanced by denying habeas review in all Fourth Amendment cases not involving "sham" proceedings in the state courts.

The denial of habeas review of Fourth Amendment claims like Mr. Cabrera's is particularly inappropriate in view of the policies that animate *Stone*. The premise behind the *Stone* bar is that "the Fourth Amendment is crucially different from many other constitutional rights." *Stone*, 428 U.S. at 490 (*quoting Kaufman v. United States*, 394 U.S. 217, 237 (1969) (Black, J., *dissenting*)). Specifically, Fourth Amendment violations are "different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not 'impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable." *Stone*, 428 U.S. at 479.

Thus, opines *Stone*, "the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant," *id.* at 490, and "ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond any shadow of a doubt that the defendant is guilty," *ibid.* (*quoting Kaufman*, 394 U.S. at 237 (Black, J., *dissenting*)).

Declaring that "[a]pplication of the [exclusionary] rule thus deflects the truthfinding process and often frees the guilty," *Stone*, 428 U.S. at 490, *Stone* reasons that "the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs," *id.* at 493.

In cases like this one, however, where the product of a Fourth Amendment violation is not inherently trustworthy physical evidence but a dubious confession, the policy rationales underpinning *Stone* do not apply. Here, Mr.

Cabrera's at-home warrantless arrest did not result in the discovery of a proverbial smoking gun. Indeed, the police found no evidence in the apartment after their unlawful arrest and search. Yet, they continued to hold Mr. Cabrera for over 37 hours during which time the teenager was fed only three times and apparently did not sleep.

It was only under those circumstances that the police extracted the confession that was central to his conviction. Unlike incriminating physical evidence discovered through an illegal search, a confession extracted nearly two days after an unlawful arrest (even if minimally "voluntary" under the Due Process Clause) hardly carries a high degree of trustworthiness.

Thus, unlike the paradigmatic seizure of conclusive and tangible evidence contemplated by *Stone*, Mr. Cabrera's unlawful arrest and subsequent detention resulted in a self-incriminating statement that calls into question the "integrity of the fact-finding process" and renders his statement "inherently unreliable." Moreover, unlike the situation envisioned by *Stone*, Mr. Cabrera's lengthy and arduous detention without probable cause raises doubt as to whether the inculpatory statement he gave was "rendered untrustworthy by the means of its seizure."

Denial of habeas review for Fourth Amendment claims involving tainted confessions is, therefore, supported by neither the holding of *Stone* nor the principles that animate it.

II. THE SEVENTH CIRCUIT'S MISREADING OF *STONE* HAS BROUGHT ITS DECISION IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

1. The court of appeals candidly acknowledged that not only panels of the Seventh Circuit but those of other circuits as well have wrestled with the challenge of figuring out how to implement *Stone*'s "full and fair litigation" standard. It cited decisions from eight other circuits that manifest "con-

siderable consternation over what exactly 'full and fair' means." (App., *infra*, 5a). On this extraordinarily important question affecting so many persons, the circuits are wildly splintered.

In fact, of the eight cases cited by the court of appeals, six provide different criteria for determining whether a habeas petitioner has enjoyed an opportunity for "full and fair litigation" within the meaning of *Stone*. For example, the Fifth Circuit holds that a habeas petitioner has been deprived of such an opportunity where "state processes routinely or systematically" are applied in such a way as to prevent the actual litigation of Fourth Amendment claims." *See Janecka v. Cockrell*, 301 F.3d 316, 321 (5th Cir. 2002) (emphasis added).

In contrast, the First Circuit requires a more individualized inquiry, which seeks to determine whether the habeas petitioner "had no realistic opportunity to litigate his Fourth Amendment claim full and fairly." *Sanna v. DiPaolo*, 265 F.3d 1, 8 (1st Cir. 2001). The Ninth Circuit looks only to the existence of an abstract opportunity to litigate. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996) (*Stone* inquiry turns solely on "whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided.").

In further contrast to the tests articulated by the First, Fifth and Ninth Circuits, *supra*, the Second, Sixth and Eighth Circuits employ two-step inquiries. The Sixth Circuit holds that under *Stone*, a habeas court must first ask "whether the state procedural mechanism, in the abstract, presents the opportunity to raise a fourth amendment claim." *Machacek v. Hofbauer*, 213 F.3d 947, 952 (6th Cir. 2000). If so, the court must then determine "whether presentation of the claim was in fact frustrated because of a failure of that mechanism." *Ibid.*

The first part of the Second Circuit's two-step inquiry is similar to that of the Sixth Circuit: there has not been an opportunity for full and fair litigation where there are no "corrective procedures at all to redress the alleged fourth amendment violations." *Capellan v. Riley*, 975 F.2d 67, 70 (2d Cir. 1992). Unlike the Sixth Circuit, however, the second part of the Second Circuit's inquiry does not merely look to whether there has been a "failure of the mechanism." *Machacek*, 213 F.3d at 952. Rather, the second part of the Second Circuit's inquiry finds that there has not been an opportunity for a full and fair hearing only where there has been an "*unconscionable* breakdown" in the underlying process. *Capellan*, 975 F.2d at 70 (emphasis added).

The Eighth Circuit agrees with the two-part test articulated by the Second Circuit, but does not permit "a probing review of the state court record, either of the factual findings pertaining to the petitioner's search-and-seizure claims or of the application of Fourth Amendment principles with those facts" in determining whether any inadequacy in reviewing the Fourth Amendment claims was "unconscionable." *Willett v. Lockhart*, 37 F.3d 1265, 1271-72 (8th Cir. 1994).

2. Into this jumble of tests comes the decision of the court below, a one-step inquiry which asks whether the state adjudicative mechanism was a "sham," but which narrowly defines a "sham" to include circumstances that are not ever likely to occur (*i.e.*, a state court refusal to recognize the Fourth Amendment, or bribery of the state judge, or the judge's "sleepwalking" through the process). (App., *infra*, 6a). Since the circumstances that would reveal a "sham" are so fanciful, the Seventh Circuit has established a test that virtually bars any meaningful inquiry of the sort *Stone* contemplated into whether the prisoner had been accorded "full and fair litigation" of his Fourth Amendment claim.

In adopting this most stringent test for confining the power of a federal habeas court, the Seventh Circuit looks

only to palpable and, indeed, implausible *procedural* defects. It expressly rejects any consideration of the merits of the Fourth Amendment claim, no matter how "egregious" the refusal to uphold a valid Fourth Amendment claim. (App., *infra*, 5a). Only *after* such a procedural error has been identified, explains the court of appeals, may a habeas court look to the substance of the state courts' decision. (App., *infra*, 6a ("Absent a subversion of the hearing process, we will not examine whether the judge got the decision right.")).

This approach goes well beyond what *Stone* held in cutting off the right to federal habeas review of Fourth Amendment violations. Although *Stone* sharply limits such review, it did not absolutely bar habeas review of all Fourth Amendment claims. The Seventh Circuit's test, however, does precisely that. By limiting Fourth Amendment claims to those addressed in "sham" proceedings, and by declaring that a "sham" proceeding is only one in which the trial judge was "bribed" or "sleepwalking," the Seventh Circuit has transformed *Stone* into an impenetrable barrier to remedying even "egregious" Fourth Amendment violations.

3. This test conflicts with tests adopted in other circuits (as noted above) which recognize that *Stone* leaves the federal courthouse door ajar to prisoners confined in violation of their Fourth Amendment rights. For example, in *Herrera v. LeMaster*, 225 F.2d 1176, 1178 (10th Cir. 2000), the New Mexico Supreme Court had applied its own law on "harmless error"—as opposed to that established by this Court's 1967 *Chapman* decision—to find that Fourth Amendment violations had been harmless. The Tenth Circuit held that New Mexico had not provided the habeas petitioner with an opportunity for full and fair litigation, because the state courts applied such a patently incorrect standard. *Ibid.* The state court proceedings were not a "sham." They just reached an egregiously wrong result, as measured by this Court's precedents.

Similarly, in *Doescher v. Estelle*, 666 F.2d 285 (5th Cir. 1982), the state courts had failed to apply a decision by this Court bearing on the defendant's Fourth Amendment claims. This Court's decision had been handed down three months before decision on the direct appeal. *See id.* at 286. The defendant sought collateral relief from the state courts, citing the intervening Supreme Court decision. *Id.* at 287. The state courts denied this relief, however, "on grounds that petitioner's contentions had been adequately dealt with in the direct criminal appeal." *Ibid.* The defendant then sought federal habeas. The Fifth Circuit held that, under these circumstances, the petitioner did not receive an opportunity for a full and fair litigation before the state courts, because the courts had not considered a relevant precedent. The Fifth Circuit did not require the prisoner to show that the failure resulted from judicial corruption or somnambulism or any other form of "sham."

As both *Herrera* and *Doescher* illustrate, other circuits do not require a prisoner to show that the state judge "had his mind closed to the necessity of a hearing, or was bribed, or decided . . . that probable cause is not required in [a particular state] . . . , or was sleepwalking . . . ." (App., *infra*, 6a). Nor was there a "subversion of the hearing process" in either of those cases. Both of those cases simply presented serious errors from which the courts were able to infer that the respective defendants had not enjoyed an opportunity for a full and fair litigation of their Fourth Amendment claims. This multi-circuit "consternation" about the meaning of one of this Court's important decisions presents a classic case for certiorari.

4. In the case at bar, the presence of grave and unexplained errors throughout the state-court proceedings need not be inferred—the State actually *conceded* that both the trial court and intermediate appellate court relied on facts which either contradicted or were unsupported by the record. (App., *infra*, 65a-66a). Moreover, as discussed in greater de-

tail *infra*, the Illinois Supreme Court ultimately decided the Fourth Amendment issue without resort to facts, employing rather a "presumption" foreclosed by this Court's decision in *Beck*.

The Seventh Circuit's procrustean refusal to take cognizance of the magnitude of substantive errors in state proceedings conflicts with the more sensible approaches adopted by other circuits.

III. THE STATE COURTS DID NOT AFFORD PETITIONER A "FULL AND FAIR" DECISION OF HIS FOURTH AMENDMENT CLAIM, AS THAT TEST SHOULD BE INTERPRETED.

A. The Illinois courts relied on "facts" not fairly supported by the record and not developed at a hearing.

If the inquiries proposed by *Townsend v. Sain* govern rather than the procedural "sham" test adopted by the Seventh Circuit, the district court properly awarded habeas relief to Mr. Cabrera.

As discussed above, the Illinois courts sustained the existence of "probable cause" to make a warrantless arrest inside petitioner's home on the basis of "facts" that the State conceded were wrong (as "found" by the trial court and the Appellate Court) or that lacked *any* record support developed at the suppression hearing or at the trial (in the case of the State Supreme Court's justification for the arrest). The district court properly concluded that this progression of "bait and switch" throughout the Illinois court system, leading eventually to a purely speculative basis for finding probable cause, meant that petitioner did not have the benefit of "full and fair" litigation of his rights.

IV. THE STANDARDS ESTABLISHED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT SHOULD BE USED TO DETERMINE WHETHER STATE COURTS GAVE "FULL AND FAIR" CONSIDERATION TO FOURTH AMENDMENT CLAIMS.

This case also poses an important issue regarding how to reconcile *Stone*'s "full and fair litigation" test with the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1218 (1996). That Act generally amended the federal habeas statute to preclude relief unless the prior state court proceedings failed to satisfy specific statutory tests. *See* 28 U.S.C. § 2254(d).

That Act generally requires federal courts to accept the rulings of state courts on federal constitutional claims, unless the adjudication in the state proceeding:

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."
>
> 28 U.S.C. § 2254(d).

The Seventh Circuit held that these statutory standards are irrelevant in considering Fourth Amendment claims and that that only *Stone*'s "full and fair litigation" standard applies.

In thrashing around to find out "exactly what 'full and fair' means" (App., *infra*, 5a-7a), however, the court ignored the clearest guidelines available: what Congress decided, after *Stone*, should be the limits that govern *all* federal habeas review of state court adjudications of federal constitutional

claims. Any state court approach to resolving a federal constitutional claim that fails to satisfy the post-*Stone* statutory tests of AEDPA should be regarded as failing to accord the accused a "full and fair" litigation of his claim under *Stone*. The Illinois courts flunked both aspects of the tests crafted by Congress to determine when it is no longer appropriate to withhold federal relief.

A. The Illinois courts' decisions are contrary to this Court's decisions that had clearly established that a person's mere presence in the company of a suspect does not give rise to probable cause to arrest him.

The district court satisfied the first prong of the test laid out in AEDPA when it concluded that the state courts had deprived petitioner of his right to "full and fair" litigation of his Fourth Amendment claim. It was patently unfair under established federal law for the Illinois courts to "assume" a finding of probable cause to arrest petitioner. Shorn of the Illinois courts' manifestly erroneous assumptions that Mr. Cabrera had cashed the traveler's checks, or that the police knew of Mr. Cabrera's criminal record, or that the police "certainly would have" learned of Mr. Cabrera's prior convictions, "the record shows only that the arresting officers knew that Petitioner had . . . accompanied someone who had purchased items with the victim's traveler's checks." (App., *infra*, 37a). This Court had clearly held, however, before the Illinois courts rejected Mr. Cabrera's Fourth Amendment claims, that mere association with a suspect is insufficient to establish probable cause.

In *United States v. Di Re*, 332 U.S. 581, 583 (1948), an informant advised police that a counterfeiter was scheduled to sell him bogus gasoline ration coupons in the counterfeiter's car. At the appointed time, police went up to the counterfeiter's car. In the car, the police found the informant, the counterfeiter and a third person, Michael Di Re.

The informant had not previously indicated to the police that Di Re was involved in any crime, and at the time of the arrest, the informant identified only the counterfeiter as having sold any of the contraband. *See id.* at 594.

The police arrested both the counterfeiter and Di Re. *See id.* at 583. After a search at the station house, police discovered contraband on Di Re as well. *See id.* This Court overturned Di Re's conviction. The Court rejected the proposition that Di Re's presence in the company of the counterfeiter was sufficient to give rise to probable cause to arrest him:

> "The argument that one who accompanies a criminal to a crime rendezvous cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passerby, in a public street of a large city, and where the alleged substantive crime is one which does not involve any act visibly criminal. . . . Presumptions of guilt are not lightly to be indulged from mere meetings." *Id.*

This Court reiterated this principle in *Ybarra v. Illinois*, 444 U.S. 85 (1979). In *Ybarra*, police searched a tavern and its owner for heroin, pursuant to a warrant. *See id.* at 87-88. In the course of the search, they frisked the customers for weapons. *See id.* at 88. During the initial frisk, the police found no weapons on Ybarra or any of the other customers. *See id.* After frisking all of the customers, the police returned to Ybarra and found a pack of cigarettes on his person. *See id.* at 89. Upon opening the cigarette pack, police discovered heroin. *See id.* Ybarra was arrested and convicted for possession. *See id.* at 89-90. As in *Di Re*, this Court overturned the conviction.

The Court observed that when the police entered the tavern, they had no reason to suspect Ybarra of any crime. *See id.* at 90-91. In fact, "the agents knew nothing in particular about Ybarra, except that he was present . . . in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale." *Id.* at 91. Under these facts, this Court held that the search of Ybarra was prohibited by the Fourth Amendment, because Ybarra's mere proximity to the suspect did not provide probable cause to search him: "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.*

The circumstances in the case at bar are indistinguishable from those in *Di Re* and *Ybarra*. Mr. Cabrera was first connected to the crime because he was seen in the company of someone who had used the victim's traveler's checks. It was solely on this basis that the detectives decided to arrest him. (App., *infra*, 47a (after assistant manager identified Mr. Cabrera, "[t]hat evening, [officers] went to the defendant's apartment")). Moreover, as in *Di Re*, Mr. Cabrera's propinquity to the suspect was "not secretive or in a suspicious hide-out", but rather "in broad daylight, in plain sight of passerby, in a public street of a large city," and indeed, at one of Chicago's larger malls. *Cf. Di Re*, 332 U.S. at 593.

As the State conceded below, Mr. Cabrera never had possession of the traveler's checks. (App., *infra*, 66a (Simon, J., dissenting)). The State has also conceded that the record does not show that the police knew of Mr. Cabrera's prior criminal convictions. (App., *infra*, 65a (Simon, J., dissenting)). Thus, as in *Di Re* and *Ybarra*, the only factual connection between Mr. Cabrera and the crime was his presence in the company of a suspect. As this Court cautioned in *Di Re*, "[p]resumptions of guilt are not lightly to be indulged from mere meetings." *Di Re*, 332 U.S. at 593.

Because such a presumption formed the sole basis for Mr. Cabrera's arrest, the arrest was not properly founded upon probable cause. The state courts' decisions sustaining probable cause were, in the words of AEDPA, 28 U.S.C. § 2254(d), "contrary to, or involved an unreasonable application of clearly defined" constitutional law previously established by this Court. They thus failed *Stone*'s "full and fair litigation" test.

B. The Illinois Supreme Court's decision, by holding that the pivotal fact in a probable cause can be assumed in the absence of any support in the record, does not satisfy the AEDPA standard for "fair" determination of a federal constitutional claim.

1. The Illinois Supreme Court held that, even though there was no record evidence that police officers had checked Mr. Cabrera's criminal history before arresting him, they "certainly would have examined the Chicago police department records" and, therefore, "it must be reasonably concluded" that they did so. (App., *infra*, 54a).

The effect of such an assumption is obvious: if state courts were permitted to assume pivotal facts which would create probable cause, the very purpose of holding hearings on Fourth Amendment claims would be rendered meaningless. By bending over backwards to accommodate such a presumption (particularly after the State conceded that both sets of "facts" adopted by the Illinois courts below were baseless), the action of the Illinois Supreme Court shows that Mr. Cabrera did not enjoy the right to "full and fair" litigation of his claim.

2. The Illinois Supreme Court's approach directly conflicts with a decision of a federal court of appeals. *See, e.g., United States v. Myers*, 308 F.3d 251, 255 (3d Cir. 2002) ("We construe the record in the light most favorable to the government. However, in doing so we do not supply the tes-

timony that the government failed to elicit during the suppression hearing. Similarly, we must refrain from drawing inferences that are either not supported by the record, or contrary to it, in an effort to uphold an arrest.").

3. Even if courts were somehow permitted to presume that police officers invariably follow procedures that appear reasonable in hindsight, such a presumption would still be insufficient to create probable cause under this Court's decision in *Beck v. Ohio*, 379 U.S. 89 (1964). In *Beck*, "the record show[ed] no more than that the officer 'had a police picture of [the defendant] and knew what he looked like,' and that the officer knew that the petitioner had 'a record in connection with [illegal gambling]'" prior to the arrest. *Id.* at 93.

This Court held such a showing to be inadequate for a warrantless arrest and search of the defendant in connection with a gambling offense. The two pieces of information possessed by the police in *Beck* are identical to the information claimed by the Illinois Supreme Court to have been in possession of the officers here: information about the defendant's physical appearance and his criminal history. Even with the improperly-made presumption applied by the Illinois Supreme Court, the finding of probable cause cannot stand.

This Court had "clearly established" (AEDPA, 28 U.S.C. § 2254(d)) that mere knowledge of a similar criminal history does not establish probable cause to arrest a person for a particular crime. It may well justify further investigation, but that is a long way from justifying a warrantless arrest in a person's home and an ensuing 37-hour confinement leading to a purported confession. This principle had been clearly established well before the Illinois Supreme Court relied on the *assumption* that the officers must have known of Mr. Cabrera's prior brushes with the law as the basis for holding that they had probable cause to arrest him.

Stone, therefore, should have been understood as permitting relief when state proceedings do not satisfy AEDPA

standards. The Seventh Circuit held, however, that AEDPA standards are irrelevant in deciding whether a prisoner had been accorded full and fair consideration of his constitutional claims in the state courts. This petition should be granted to establish that federal habeas courts should draw upon AEDPA standards in deciding whether review of Fourth Amendment claims is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2003

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-4002

WILLIAM G. CABRERA,

Petitioner-Appellee,

v.

CHARLES L. HINSLEY, WARDEN,*

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 2990—Joan H. Lefkow, ***Judge.***

ARGUED JANUARY 9, 2003—DECIDED MARCH 31, 2003

Before RIPPLE, ROVNER, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* The district court granted William G. Cabrera's petition, pursuant to 28 U.S.C. § 2254, for a writ of habeas corpus as to convictions in the circuit court of

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* Our docket was modified on January 6, 2003, to reflect that Warden Charles L. Hinsley, and not Warden George C. Welborn, now has custody of Mr. Cabrera.

Cook County, Illinois, for burglary, robbery, and murder. The State appeals.

The present petition concerns convictions in 1983, as a result of which Cabrera received sentences of 60 years imprisonment for murder and 14 years each for robbery and burglary, the latter two reduced to 7 years by the Illinois Appellate Court. *People v. Cabrera*, 480 N.E.2d 1170 (Ill. App. 1985). All sentences run concurrently. In addition, Cabrera is serving a natural life sentence for an unrelated murder conviction. Because of the separate murder conviction, the relief in this case was conditioned on "the invalidation of the other, presumptively lawful, sentences authorizing his continued confinement."

The evidence at trial showed that on the night of February 10, 1981, the office of the Assyrian National Foundation in Chicago was broken into, money was stolen, and Yoel A. Keena, a 74-year-old man staying as a guest at the Foundation, was killed by strangulation and battery with a blunt instrument. At the crime scene, detectives found a receipt for traveler's checks issued in Keena's name. Later, the detectives learned that the checks were used to purchase clothing at a store in Chicago the next day. They questioned Derrick Moore, the assistant sales manager of the store, and learned that three men had come into the store at about 8 p.m. on February 11. A man later identified as Ruben Lopez, using Keena's traveler's checks, purchased a red jacket, a white shirt with a Popeye logo, and a necktie. Moore saw the men go into another store and emerge with more merchandise. On February 23, Moore looked through police mug shots and identified a photograph of Cabrera as one of the men with Lopez when he cashed the check. The police arrested Cabrera at his home without a warrant, and a search of his home at the time of his arrest came up dry. Cabrera waived his Miranda rights, however, and gave a series of contradictory statements.

With the consent of his mother and sister, the police searched Lopez's apartment, where a shirt with a Popeye logo was found. They also found an identification card that Moore (the fellow from the store) said Lopez used in cashing the traveler's checks. Later the red jacket was found as well.

On February 26 Cabrera made another statement, telling the detectives that he and Lopez had entered the Foundation through a broken window. Lopez told Cabrera to search the front of the building. Cabrera found a metal cash box, which he pried open. He took the $40 which was in the box. While Cabrera was in the front office, Lopez went to the back, where he found Keena. Cabrera saw Lopez strike Keena twice. Cabrera then searched Keena's pockets, where he found the traveler's checks. Lopez took the checks and Cabrera kept the $40. After making this statement, Cabrera consented to a search of his apartment, where the police found two pairs of pants Lopez had bought for him. Cabrera was convicted of murder, robbery, and burglary.

After exhausting his state court remedies, Cabrera filed the present petition, which included the two claims before us: whether probable cause existed for Cabrera's warrantless arrest (which led to several incriminating statements) and whether the prosecution proved beyond a reasonable doubt that he was guilty of burglary. The Illinois courts found that probable cause existed for the arrest and that the evidence supported the burglary conviction. As we said, the district court conditionally granted the writ.

Section 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) under which this petition was brought, provides that habeas relief may not be granted unless the state court proceeding

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

However, Cabrera's claim regarding his arrest faces a preliminary hurdle. Fourth Amendment claims are subject to the strictures set out in *Stone v. Powell*, 428 U.S. 465 (1976). And those claims, we have recently said, are outside the scope of the statute:

> The AEDPA's changes to § 2254(d) apply only to cases within the scope of § 2254(a) ... and *Stone* is based on an interpretation of § 2254(a) that treats inaccurate administration of the exclusionary rule as outside the scope of that statute.

Hampton v. Wyant, 296 F.3d 560, 563 (7th Cir. 2002).

Stone limited the role of the federal courts in evaluating Fourth Amendment claims of state prisoners who, relying on the exclusionary rule, contend that allegedly unconstitutionally seized evidence should not have been used against them. The Court noted that the exclusionary rule, whose purpose is deterrence of illegal police conduct, actually hampers the central purpose of a criminal trial, which is determining the guilt or innocence of a defendant. The Court reasoned that in the context of habeas petitions, the benefit of the exclusionary rule is minimal compared to the substantial societal costs of applying it. Therefore, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." At 494. It sounds simple but has, in fact, caused considerable consternation over what exactly "full and fair" means.[1]

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[1] *See, e.g., Janecka v. Cockrell*, 301 F.3d 316 (5th Cir. 2002); *Sanna v. Dipaolo*, 265 F.3d 1 (1st Cir. 2001); *Machacek v. Hofbauer*, 213 F.3d 947 (6th Cir. 2000); *Ortiz-Sandoval v. Gomez*, 81

The only help in *Stone* is a footnote to a prior case: "Cf. *Townsend v. Sain*, 372 U.S. 293 (1963)." And of course the value, generally, of "Cf." citations is often only revealed in the eye of the beholder.

Recently, we have waded again into the debate in an attempt to clarify some of our earlier cases. Our traditional formulation was that a petitioner had a full and fair opportunity to litigate if

> (1) he has clearly informed the state court of the factual basis for that claim and has argued that those facts constitute a violation of his fourth amendment rights and (2) the state court has carefully and thoroughly analyzed the facts and (3) applied the proper constitutional case law to the facts.

Pierson v. O'Leary, 959 F.2d 1385, 1391 (7th Cir. 1992). This test spawned many arguments, including one that the litigation was "full and fair" only if the state court decided the issue correctly. This erroneous interpretation of *Stone* was pretty clearly sent packing by our decision last year in *Hampton*. In *Hampton* we observed that the *Pierson* approach nullifies the holding of *Stone* and leads to collateral relief whenever the search violates the fourth amendment. Even an egregious error would not by itself justify habeas relief:

> [A] blunder, no matter how obvious, matters only in conjunction with other circumstances that imply refusal by the state judiciary to take seriously its obligation to adjudicate claims under the fourth amendment.

F.3d 891 (9th Cir. 1996); *Willett v. Lockhart*, 37 F.3d 1265 (8th Cir. 1994); *Capellan v. Riley*, 975 F.2d 67 (2d Cir. 1992); *Boggs v. Bair*, 892 F.2d 1193 (4th Cir. 1989); *U.S. ex rel. Petillo v. New Jersey*, 562 F.2d 903 (3d Cir. 1977).

296 F.3d at 564.

Unsatisfied by this formulation, the State wants us to take this opportunity to further clarify the standard. The concern is that *Hampton*'s focus continues to be on the quality of the hearing. The State says that a focus on the quality of the hearing cannot be what *Stone* envisioned; rather, the exception must turn on whether the State provides a mechanism under which to litigate a Fourth Amendment claim. If it does, *Stone* precludes habeas review.

Unlike the State, we do not read *Hampton* as implying federal courts must examine in any significant detail the quality of the hearing. *Quality*, after all, is a word which can lead us right back to confusion as to whether the state judge had to arrive at the right decision in order for the hearing to pass muster. But it is true that *Hampton* stops just short of what the State urges. *Hampton* means that even if the State provides a mechanism under which to litigate a claim, *Stone* would not block habeas review if the mechanism was in some way a sham. For instance, *Stone* would not block habeas review if the judge had his mind closed to the necessity of a hearing, or was bribed, or decided, as *Hampton* says, that probable cause is not required in Illinois, or was sleepwalking (another example from *Hampton*), or in some other obvious way subverted the hearing. *Hampton* does not mean, however, that federal courts will examine whether the judge seemed to have done some quality preparation for the hearing or had a perfect understanding of the fine points of search and seizure law. Absent a subversion of the hearing process, we will not examine whether the judge got the decision right. But we continue to believe that we would be wrong to close our eyes entirely to possible abuses and to say simply that *Stone* applies if the State allows motions to suppress evidence to be brought, never mind that a particular judge undermined the process in some disturbing way. In short, "full and fair" guarantees the right to present one's case, but it does not guarantee a correct result.

We also note in passing that Cabrera's case is an example of *Stone*'s concern with limiting the exclusionary rule to its intended purpose of deterring police misconduct. Cabrera's crime was committed 22 years ago, in 1981; he was convicted in 1983. One could certainly argue that the deterrent effect of overturning his 19-year-old conviction is outweighed by the damage to society which could flow from reopening the suppression hearing issues which were resolved so long ago. Viewed from this perspective, our case illustrates what *Stone* was talking about when it said that the exclusionary rule "if applied indiscriminately ... may well have the opposite effect of generating disrespect for the law and administration of justice." At 491.

Applying the *Hampton* standard to this case, we find that Cabrera had a full and fair opportunity to litigate his claim that his arrest was illegal. He raised the issue in a suppression hearing prior to trial; the Illinois Appellate Court, *Cabrera*, 480 N.E.2d 1170, and the Illinois Supreme Court, *People v. Cabrera*, 508 N.E.2d 708 (1987), also considered the issue. There is no indication that these courts were careless of Cabrera's right to present his claim. Cabrera contends that the fact that the basis of the decision changed from one court to another shows that the determinations did not meet the test for a full and fair hearing. Particularly, he points out that the Illinois Supreme Court assumed that the police were aware of his criminal record, a finding he says the evidence did not support. Whether there was anything in the record which would allow the inference that the police knew of his record is subject to debate. What is clear, however, is that a finding that there was, even if erroneous, does not support a piercing of *Stone* to send a federal court sifting through the evidence to see whether the Illinois courts were, in its view, correct in determining that probable cause existed.

The other issue before us—whether the evidence is sufficient to sustain the burglary conviction—is within the ambit of § 2254(a) and (d), which means that habeas relief may be

granted only if the state court proceeding resulted in a decision which was contrary to, or an unreasonable application of, established federal law as determined by the Supreme Court, or was based on an unreasonable determination of the facts.

Before we launch into an analysis of this issue, we admit some bewilderment about being asked to evaluate the burglary conviction because, on the surface at least, it would seem to be an exercise in futility. We understand that the Supreme Court determined in *Benton v. Maryland*, 395 U.S. 784 (1969), that a habeas petition is not made moot by the existence of a concurrent sentence (which would mean that release from custody is not possible even were the petition granted). But here, Cabrera has three other concurrent sentences—two murder convictions and a robbery conviction. If he had prevailed on his Fourth Amendment argument in this petition, one of the murder convictions, the robbery conviction, and the burglary conviction would all have been set aside. If that had happened, only one conviction would have stood between him and freedom, making it reasonable to consider the Fourth Amendment claim in the current petition. But it is also true that if he had prevailed on his claim that his arrest was invalid, there would be no reason to discuss the burglary conviction separately. And now that he has failed (before us) on the Fourth Amendment claim, it is hard to see, in the real world, how setting aside his burglary conviction does him any good. No doubt he has served his time. His was a 7-year sentence imposed 20 years ago. And the possibility of realistic collateral consequences from the burglary conviction are remote at best and probably, more accurately, nonexistent.

What we find even more bewildering is what the State has to gain by resisting this claim. The claim is highly fact-specific, and granting the writ in this case seems unlikely to change the course of Illinois law.

To explain: In Illinois, burglary is defined as knowingly entering a building "with the intent to commit therein a felony or theft." The information (the charging document in Illinois) alleged that Cabrera "committed the offense of burglary in that he, without authority, knowingly entered into a building, to wit: the dwelling of Yoel Keena with the intent to commit the offense of robbery therein." Robbery, then, is the felony that Cabrera is charged with intending to commit when he entered the building. The problem is that the building was not a residential building and there was no evidence that Cabrera and Lopez knew Keena or anyone else was living there when they broke in. Therefore, Cabrera's argument is that he could not have had the intention to commit robbery when he entered the building, and without that intention, he cannot be guilty of burglary as it was charged. During the trial, the prosecutor asked that the jury be instructed that Cabrera could be convicted of burglary if he intended to enter the building with the intent to commit robbery or theft. The judge refused—we can't understand why—and the jury was instructed that a person commits burglary when he enters a building to commit robbery. The jury was instructed that robbery was the taking of property from a person or the presence of another by the use of force or threatened force. The jury convicted Cabrera of burglary (as well as robbery and murder).

Cabrera's constitutional claim in the present petition is that the evidence of his intent to commit robbery was insufficient to sustain the burglary conviction. In fact, he says it was nonexistent.

The district court granted the petition with regard to this claim, saying that the decision of the state court was "either 'contrary to' *Jackson [v. Virginia*, 443 U.S. 307 (1979)], or, if we assume that its standard was functionally equivalent to *Jackson*'s, it was an unreasonable application of it."

The *Jackson* standard is that a petitioner is "entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." At 324. The Illinois Supreme Court said that the determination of the jury "will not be disturbed on review unless the evidence is so improbable as to cast reasonable doubt on the guilt of the defendant." 108 Ill.Dec. 397, 508 N.E.2d at 716. Is the latter "contrary to" the former? Cabrera does not explain in any detail how the two are meaningfully different. The Illinois court was using the right burden of proof even though the phrase from *Jackson* was not parroted. We do not see this standard as contrary to *Jackson.*

So the question becomes whether the determination by the Illinois Supreme Court that the evidence was sufficient to sustain the burglary conviction is an unreasonable determination of the facts. The Illinois courts recognize that evidence of intent is usually not direct. For that reason, it may be proved circumstantially by inferences reasonably drawn from the circumstances of the defendant's conduct. *People v. McKinney*, 631 N.E.2d 1281 (Ill. App. 1994). Those circumstances include "the time, place and manner of entry into the premises, the defendant's activity within the premises, and any alternative explanations offered for his presence." *People v. Richardson*, 470 N.E.2d 1024, 1027 (1984).

The application of this principle can be seen in *People v. Zuniga*, 425 N.E.2d 1094 (Ill. App. 1981). The defendant entered a church basement through a broken window. A priest noticed the broken window and entered the church, where he encountered the defendant. The defendant struck the priest with a metal rod and demanded his money. Zuniga made the argument which Cabrera makes here—that he did not enter the church with the intent to commit robbery—and the court found that the requisite intent could be inferred by what happened inside the church. The issue was one for the jury.

On the other hand, intent could not be inferred from the defendant's actions in *People v. Toolate*, 461 N.E.2d 987 (1984). Toolate was charged with burglary with intent to commit a felony—in this case rape. The sole issue was whether he intended to commit rape when he knowingly and without authority entered a woman's home. Because he did nothing inside the home that pointed toward rape, the court found the evidence insufficient:

> Strange as Toolate's behavior was, the record contains no evidence whatever that he used force against or that he intended to have sexual intercourse with Debbie Sue. The best evidence that Toolate did not intend to engage in sexual activity by force is that there was no force and no threat of force, no sexual activity and no threats, promises, or suggestion of any kind. The defendant had no weapon. He did not harm or threaten to harm either Debbie Sue or the children. There was no sexual contact here. Presumably Debbie Sue was clad in no more than night-clothes, but the record is silent on this point. Whatever she was or was not wearing, Toolate did not ask her to undress, and did not attempt to undress her. He was fully clothed, including a jacket, and he did not remove any of his own clothing. He did not caress or fondle her, or begin any sexual activity.

At 989.

In Cabrera's case, on the other hand, there is unquestionably evidence of robbery. From that, a jury could reasonably conclude that Cabrera and Lopez entered the building with the intent to commit any number of offenses, including robbery.

On this issue, we decide only whether the Illinois Supreme Court decision was based on an unreasonable determination of the facts in light of the evidence presented at trial.

We cannot say it was. Therefore, the decision of the district court is REVERSED and the case is REMANDED to the district court for entry of an order denying Cabrera's petition for a writ of habeas corpus.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. WILLIAM CABRERA,	)	
Petitioner,	)	**No. 97 C 2990**
v.	)	**Judge Joan H. Lefkow**
THOMAS F. PAGE, Warden,	)	**DOCKETED Oct. 31 2001**
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Petitioner William Cabrera challenges his convictions for murder, robbery and burglary entered in the Circuit Court of Cook County, Illinois. The court grants the writ.[2]

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[2] Following the convictions at issue here, Cabrera was convicted of another murder resulting in a sentence of imprisonment for life. Vacating the convictions at issue here will accordingly not affect the duration of his imprisonment. This petition is not moot, however, because of the possibility, however remote, that the other conviction or resulting sentence may be set aside. *Benton v. Maryland*, 395 U.S. 784, 788-91 (1969). Benton's reasoning is questionable in light of

LEGAL STANDARDS

Under 28 U.S.C. § 2254(d), a federal court may not grant a prisoner's habeas corpus petition unless the state court's adjudication of the claim either "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." When considering the § 2254 petition, this court will presume that any state court factual determinations are correct unless the petitioner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Before reviewing the state court's decision, however, this court must determine whether the petitioner fairly presented his federal claims to the state courts, as any claim not presented to the state's highest court is deemed procedurally defaulted. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999); *Wilson v. Briley*, 243 F.3d 325, 326 (7th Cir. 2001); *Bocian v. Godinez*, 101 F.3d 465, 468 (7th Cir. 1996). A federal court may not grant habeas relief on a defaulted claim unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*

Spencer v. Kemna, 523 U.S. 1 (1998), and the Court's more restrictive view of the "case or controversy" requirement. Nevertheless, while the Court in *Spencer* declined to extend "our presumption of collateral consequences (or our willingness to accept hypothetical consequences)," *id.* at 12, to parole revocations, *id.* at 14, it left the presumption intact with respect to criminal convictions. *See Diaz v. Duckworth*, 143 F.3d 345 (7th Cir. 1998).

v. Thompson, 501 U.S. 722, 750 (1991); *Anderson v. Cowan*, 227 F.3d 893, 899 (7th Cir. 2000).

PROCEDURAL HISTORY

On April 13, 1983, a jury convicted Petitioner of murder, burglary and robbery. On May 5, 1983, the trial judge imposed extended sentences for all three offenses, 60 years for murder and 14 years in prison for burglary and robbery, all sentences to run concurrently. The Illinois Appellate Court affirmed Petitioner's conviction on June 20, 1985, but found the trial court erred in imposing extended term sentences for the burglary and robbery convictions and shortened them to seven years each. *People v. Cabrera*, 134 Ill.App.3d 526, 480 N.E.2d 1170 (1st Dist. 1985) ("*Cabrera I*"). The Illinois Supreme Court affirmed on April 16, 1987. *People v. Cabrera*, 116 Ill.2d 474, 108 Ill.Dec. 397, 508 N.E.2d 708 (1987) ("*Cabrera II*"). The United States Supreme Court denied certiorari November 2, 1987. *Cabrera v. Illinois*, 484 U.S. 929 (1987).

Petitioner filed a *pro se* post-conviction petition which was dismissed as untimely on May 28, 1992. The Illinois Appellate Court affirmed the denial of the post-conviction petition on December 31, 1992, and the Illinois Supreme Court denied Petitioner leave to appeal on June 3, 1993. On August 14, 1992, Petitioner filed his first federal habeas corpus petition, which was dismissed without prejudice for failure to exhaust state court remedies on October 29, 1993, apparently on the mistaken belief that Petitioner's post-conviction proceedings were still pending. The present petition for habeas corpus was received April 24, 1997.[3] The

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[3] As the Seventh Circuit held in *Jones v. Bertrand*, 171 F.3d 499 (7th Cir. 1999), that *pro se* petitions filed by incarcerated persons receive the benefit of the "mailbox rule" of *Houston v. Lack*, 487 U.S. 266 (1988), this petition is

petition was originally assigned to Judge Alesia of this court. On January 22, 1998, it was reassigned to Judge Andersen and on September 5, 2000 to the undersigned.

EVIDENCE AT TRIAL

Evidence at trial showed that on the night of February 10, 1981, the offices of the Assyrian National Foundation in Chicago were broken into, money was stolen, and Yoel A. Keena, a 74-year old man staying as a guest at the Foundation, was killed as a result of strangulation and battery with a blunt instrument.

At the crime scene detectives found a receipt for travelers' checks issued in Keena's name. Tracing Keena's checks, they learned that they had been used to purchase clothing at the "Different Circle" store in the Century Mall in Chicago. The police questioned the assistant sales manager, Derrick Moore, and learned that three men had come into the store together at about 8 p.m. on February 11 and a man later identified as Ruben Lopez purchased a red jacket, a white shirt with a Popeye logo, and a necktie using a traveler's check, and an identification card bearing Lopez' picture had been used. Moore watched the men go together to another store and emerge with more merchandise.

On February 23, after looking through police "mug shots," Moore identified a photograph of Petitioner as one of the men present with Lopez when he cashed the check, and the police arrested Petitioner in his home. After waiving his Miranda rights, Petitioner then gave a series of statements,

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deemed filed within the "grace period" announced by *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), rev'd on other grounds, 521 U.S. 320 (1997), and exempt from the one-year limitations period of 28 U.S.C. § 2244(d) enacted by the Anti-Terrorism and Effective Death Penalty Act (AEDPA).

first denying any knowledge of the cashing of the check or the murder, then later telling the detectives that Lopez had approached him with the checks, saying that he had found them in the alley. Petitioner changed his story again, and said that Lopez told him he had obtained the checks by "ripping off a place" next to a dog-grooming parlor, and Lopez and he then went to the shopping mall and cashed the checks.

Searching Lopez's apartment with the consent of his mother and sister, police found a white shirt with a Popeye logo which Petitioner identified as one of the items purchased with the stolen traveler's checks. Continuing the search, the police found an identification card that Derrick Moore later identified as the card used by Lopez in cashing the traveler's checks. Detectives later found the red jacket that had been purchased at the "Different Circle" store.

On February 26 Petitioner made yet another even more incriminating statement, telling the detectives that the night before the checks were cashed he and Lopez had entered the Foundation through a broken window in the office. Once inside, Lopez told him to "search in the front" of the Foundation. Petitioner found a metal cash box, pried it open, and took the $40 in it. Petitioner said that while he was in the front office, Lopez went to the back of the Foundation where he found the victim, who had been awakened by the intrusion. Petitioner saw Lopez strike the victim twice. Petitioner then went to the back room and searched the victim's pockets, finding the traveler's checks. He and Lopez then left the premises, Lopez taking the traveler's checks and the defendant keeping the $40 Petitioner stated that on the following day, Lopez told him that he was going to cash the traveler's checks; if Petitioner came along, Lopez would buy something for him. Petitioner agreed, and several items of clothing were purchased with the checks, including a red jacket. Petitioner then signed a written statement to this effect, and signed a consent to search his apartment again,

where the police found the two pairs of pants Lopez had bought for Petitioner.

PETITIONER'S CLAIMS

Petitioner raises six claims: (1) Petitioner was denied the right to trial by a fair and impartial jury because post-conviction juror polling indicated possible dissent; (2) the state failed to prove beyond a reasonable doubt that Petitioner entered the building where the crime occurred with an intent to commit robbery; (3) probable cause did not exist for Petitioner's warrantless arrest; (4) the Illinois legislature failed to provide Petitioner with adequate and meaningful notice of changes in Illinois' post-conviction relief statute, thereby denying Petitioner due process of law, and also deprived Petitioner of access to the courts in violation of the First Amendment; (5) ineffective assistance of appellate counsel; and (6) Petitioner was denied due process of the law because the Illinois felony murder statute holds a person responsible for another's actions without proof of the elements of first degree murder. Respondent concedes that Petitioner has exhausted all state court remedies, but asserts that Petitioner has procedurally defaulted his fourth and sixth claims.

1. Trial By A Fair And Impartial Jury

> While polling the jury after the guilty verdict, the following exchange occurred:
>
> THE COURT: I'm going to ask you this question, and I want you to pay attention to it. Was this and is this now your verdict, Miss Cancinelli [sic]?
>
> MS. CANCINELLI[4] [sic] [juror]: Can I say what I have to say, or do I have to give a yes, or no answer?
>
> THE COURT: I want a yes or no answer. Was this and is this now your verdict?

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[4] The correct spelling of this juror's surname is Ciancanelli.

MS. CANCINELLI [sic]: I found in my own person mind—

THE COURT: I said I want a yes or no answer. Was this and is this now your verdict?

MS. CANCINELLI [sic]: Yes.

Cabrera I, 480 N.E.2d at 1172. Petitioner argues that the trial court's refusal to provide this juror with an opportunity to express any possible disagreement with the verdict calls the jury's unanimity into question. Petitioner notes that after the polling was complete, the trial court denied his counsel's request that Ms. Ciancanelli's statements be put on the record, and that Ms. Ciancanelli gave a sworn statement, in the presence of a court reporter, stating that at the time of the polling she had wished to recant her guilty verdict. Both the Illinois Appellate and Supreme Courts found Petitioner's claim without merit.

The Illinois Appellate Court first noted that the Sixth Amendment of the United States Constitution guarantees a trial by an impartial jury, and that "[e]ssential to that guarantee is the requirement that the verdict reached be freely arrived at by each juror." *Cabrera I*, 480 N.E.2d at 1172-73. The court then distinguished this case from cases in which Illinois courts found that a trial judge did not properly explore a juror's hesitant, ambivalent, or dissenting response when polled. The court found that Ms. Ciancanelli's response did not indicate any hesitancy or ambivalence and further determined that it would not second-guess the trial court's observations regarding the juror's demeanor and tone of voice. Moreover, the court held that Ms. Ciancanelli's later statement was neither admissible nor reviewable by the court, as it went to the deliberation process and was taken after the verdict had been read and the jury had already been polled and discharged. The Illinois Supreme Court agreed.

The Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." *Morgan v. Illinois*, 504 U.S. 719, 726-27 (1992). *See also Sullivan v. Louisiana*, 508 U.S. 275, 277 ("The Sixth Amendment provides"); *Porter v. Gramley*, 112 F.3d 1308, 1315 (7th Cir. 1997).

Petitioner does not argue that the state court decisions were contrary to, or involved an unreasonable application, of clearly established federal law. Instead, Petitioner argues that "[t]he refusal of the trial court to provide juror, Ms. Ciancanelli, with an opportunity to express any possible disagreement she had with the verdict's [sic] raises doubt as to the unanimity of the jury" and that "[t]he Appellate Court, in holding that the juror's replies did not indicate ambivalence or hesitancy in her answer, misconstrued the facts of the case at bar." (Pet. at 29.) Petitioner therefore appears to claim that the state court decisions were based on an unreasonable determination of the facts presented. The court disagrees. At most, the colloquy between the trial court and Ms. Ciancanelli indicated that she wanted to further explain why she decided on her verdict, not that her verdict was erroneous.

With respect to Ms. Ciancanelli's later statement, the state court ruling was completely consistent with federal law as determined by the Supreme Court. The Supreme Court has stated that by the beginning of the twentieth century, there existed a firmly established common-law rule that "flatly prohibited the admission of juror testimony to impeach a jury verdict" and that unless there was evidence of outside influence on the jury, juror testimony impeaching a verdict is inadmissible. *Tanner v. United States*, 483 U.S. 107, 117 (1987) (citing, among other cases, *McDonald v. Pless*, 238 U.S. 264, 267 (1915)). Cf. Fed. R. Evid. 606(b). Petitioner does not argue that Ms. Ciancanelli's proffered

recantation falls into the extraneous influence exception. Petitioner is not entitled to habeas corpus relief based on his first claim.

2. Failure To Prove Burglary Beyond A Reasonable Doubt

Petitioner was found guilty by a jury of murder, burglary, and robbery. The evidence at trial showed that Lopez, rather than Petitioner, actually killed Keena. Nevertheless, under Illinois law, "a person is legally accountable for the conduct of another when ... either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." Ill.Rev.Stat.1981, ch. 38, par. 5-2© (now codified at 720 ILCS 5/5-2©). A reasonable jury could have found Petitioner accountable for Lopez's acts. Petitioner did not challenge the sufficiency of the evidence with respect to his convictions for murder and robbery.

Petitioner did challenge the sufficiency of the evidence with respect to his burglary conviction. Illinois law provided that "[a] person commits burglary when without authority he knowingly enters ... a building ... with intent to commit therein a felony or theft." *Cabrera I*, 480 N.E.2d at 1175 (quoting Ill. Rev. Stat. 1981, ch. 38, par. 19-1(a)). The evidence showed that Petitioner had entered a building without authorization and his intent to commit a theft could reasonably be inferred from this, absent another explanation for his presence there.

Nevertheless, Petitioner was not charged with entering a building with intent to commit a theft; he was charged with entering a building with the intent to commit *robbery*. The information charged that Petitioner "committed the offense of burglary in that he, without authority, knowingly entered into a building, to wit: the dwelling of Yoel Keena

with the intent to commit the offense of robbery therein." Tr. 2237.

Since the Foundation was not a residential building, and there was no evidence that Petitioner or Lopez knew Keena was living there, Petitioner could not have had the intention to commit robbery when he entered the building. Because the prosecution's case was built on Petitioner's statements to the police, there appears to be no reason why the state could not have initially charged Petitioner with the intent to commit theft, or amended the information prior to trial. Only in the jury instruction conference did the prosecution belatedly recognize that the charge did not fit the evidence against Petitioner. The prosecutor asked that the jury be instructed that it could convict Petitioner of burglary if they found he entered the building with the intent to commit *robbery or theft*. Petitioner's counsel objected, and the trial judge refused the prosecution's instruction. Distinguishing cases in which the defendant had not been surprised by a variation between the acts charged in the indictment and jury instructions based upon evidence adduced at trial, the court stated that "you [the prosecution] are interjecting the offense of theft. That has not even been mentioned. It was not mentioned in opening statements." Tr. at 1961. Commenting that "it is clear to this Court that whoever made up this charge, apparently, didn't know what they were doing," the trial judge found it "extremely prejudicial" to include intent to commit theft in the instruction. Tr. at 1362.[5]

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[5] In this the trial judge may have erred. Under Illinois law, jury instructions may depart from the charging document to correspond to the evidence "as long as the variance does not mislead the defendant in the presentation of his defense, does not expose him to double jeopardy, and as long as there was ample evidence presented to the jury to permit it to find the defendant guilty of the charged crime beyond a rea-

The jury was accordingly instructed: "a person commits the offense of burglary when he enters a building when he, without authority, knowingly enters a building with intent to commit therein the offense of robbery." Tr. at 2128. Petitioner was separately charged with robbery, and the jury instructions correctly defined robbery as "[taking] property from the person or presence of another by the use of force or by threatening the imminent use of force." Tr. at 2127. These instructions were recapitulated at Tr. 2130-31, in which the elements of burglary and robbery were set forth. The burglary instruction again stated that an element of burglary was the intent to commit robbery. Despite the lack of evidence of Petitioner's intent to commit robbery at the time he entered the building, the jury convicted him of burglary anyway.

On appeal, Petitioner argued that his conviction for burglary should be reversed because there was no evidence showing that either he or Lopez had reason to know that anyone was in the building when they entered it, hence no evidence of intent to commit robbery, the felony upon which the burglary charge was predicated. In response, the state feebly sought to find supporting evidence in the record, arguing that the violence of the assault supported an inference of an origi-

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sonable doubt." *Jenkins v. Nelson*, 157 F.3d 485, 498 (7th Cir. 1998), *cert. denied*, 527 U.S. 1039 (1999); *citing, inter alia, People v. Foster*, 103 Ill.App.3d 372, 431 N.E.2d 430 (1982), and *People v. McEvoy*, 33 Ill.App.3d 409, 337 N.E.2d 437 (1975). Here Petitioner did not take the stand, and his intent at the time he entered the Foundation was primarily to be inferred from his statements to police. His counsel attempted to argue that his statements were coerced and unreliable. It is doubtful that charging him with the intent to commit theft, rather than robbery, would have affected his defense.

nal intent to rob, and noting that Petitioner had lived a short distance away from the Assyrian National Foundation. Ans. Exh. (e) at 41-44. Alternatively, the state argued that Petitioner had not been prejudiced, mischaracterizing Petitioner's argument as an attack on the charging information.

The Illinois Appellate Court either misunderstood or ignored Petitioner's argument. The court stated that Petitioner's intent to commit a *theft* could be inferred from the evidence, ignoring the fact that this was not what the jury was instructed to find. *Cabrera I*, 480 N.E.2d at 1175. The Illinois Supreme Court, in contrast, recognized that Petitioner had been specifically charged with unauthorized entry with intent to commit robbery, but stated that "it was the province of the jury to determine the question of intent, and that determination will not be disturbed on review unless the evidence is so improbable as to cast reasonable doubt on the guilt of the defendant." *Cabrera II*, 508 N.E.2d at 716.

The Illinois Supreme Court followed *People v. Zuniga*, 99 Ill.App.3d 396, 425 N.E.2d 1094 (1st Dist. 1981). The facts of *Zuniga* were indeed similar, and equally problematic. The defendant had broken into a church basement, and a priest saw evidence of the break-in and went into the church to investigate. When the priest confronted the defendant, the defendant attempted to rob him. The defendant, like Petitioner, was charged with breaking into the church intending to commit robbery. (The opinion in *Zuniga* does not state whether the jury instructions followed the charge; presumably they did.) The defendant's conviction was affirmed, the court likewise stating that it was for the jury to determine the defendant's intent. The court did not explain how the jury could have found that the defendant broke into an unoccupied church basement with the intent to commit robbery.

In each case the jury ignored their instructions in favor of their common sense. In common understanding, a burglar is someone who breaks in to steal, and both Petitioner and the defendant in *Zuniga* eminently fit that definition. Since in each case the defendant's conduct also fit the statutory definition of burglary—though not the definition given the jury—the court was not terribly troubled by the inconsistency.

Our system of justice, however, does not permit the jury's common sense to substitute for the fixed rules implied by "due process of law." The jury was asked to determine whether Petitioner had an intent to rob, and found that he did. If this finding cannot be sustained, it will not do to say that if the jury had been instructed to find an intent to steal they could have done so. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("to hypothesize a guilty verdict that was never in fact rendered— no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee").

In reviewing petitioner's claim, the Illinois Supreme Court stated that the jury's determination of intent would be upheld "unless the evidence is so improbable as to cast reasonable doubt on the guilt of the defendant." *Cabrera II*, 508 N.E.2d at 716. This is not equivalent to the clearly established constitutional standard, "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). If specific intent is an element of the crime, as it is of burglary, and there is no evidence from which the requisite intent can be inferred, the conviction fails the *Jackson* test, whether or not there is anything "improbable" about the evidence presented. A reasonable application of the *Jackson* test requires some discussion of how the evidence, viewed in the light most favorable to

the prosecution, supports the jury's finding as to the elements of the crime. The conclusion that Petitioner was properly convicted of burglary is either "contrary to" *Jackson* because the Illinois Supreme Court applied a different standard, or, if we assume that its standard was functionally equivalent to *Jackson*'s, it was an unreasonable application of it.

In its answer to the habeas petition, the state takes the position of the Illinois Appellate Court, that because the jury could properly have found Petitioner entered the Foundation with the intent to commit a theft, the *Jackson* test is met. This is not the rationale of the Illinois Supreme Court, however, nor could it be in light of prior cases.

In *People v. Toolate*, 101 Ill.2d 301, 461 N.E.2d 987 (1984), the Illinois Supreme Court reversed a conviction for burglary where the defendant had broken into a house, went to the complaining witness's bedroom and moved some furniture around. When the complainant awoke and saw him, she was able to chase him out of the house without resistance. The defendant was charged and convicted of residential burglary with intent to commit rape. The Illinois Supreme Court reversed the conviction because there was no evidence that the defendant intended to commit rape. The court acknowledged that in the absence of inconsistent circumstances, intent to commit theft can be inferred from proof of unlawful breaking and entering. Nevertheless, proof of breaking and entering was not sufficient to establish the intent to commit another felony; if so, the requirement of specific intent to commit that other felony would be meaningless. *Id.*, 461 N.E.2d at 308. The court concluded:

> The defendant in this case was not charged with burglary with the intent to commit theft, and cannot, therefore, be convicted of that offense. Because the State has failed to prove beyond a reasonable doubt that Toolate entered the dwelling with the intent to commit a rape, the only offense with which he was

charged, the conviction and the appellate court's affirmance are reversed.

Id. Consistent with *Toolate*, the Illinois Supreme Court in Petitioner's case recognized that his burglary conviction depended on proof of his intent to commit robbery, and could not be sustained by evidence of intent to commit theft. *See also People v. Ortiz*, 156 Ill.App.3d 170, 509 N.E.2d 633 (1st Dist. 1987) (Defendant entered home believing it empty, was surprised, and threatened occupant with gun in escaping. The trial court directed a verdict of acquittal on charge of burglary with intent to commit robbery because although defendant had intent to steal, he did not have the intent to rob when he entered the house.) In order to sustain Petitioner's conviction, the Illinois Supreme Court unreasonably found that a reasonable jury could have found that Petitioner intended to commit robbery at the time he entered the building. Petitioner's burglary conviction accordingly cannot stand.

3. Probable Cause For Arrest

Petitioner contends here, as he contended before the Illinois Supreme Court, that probable cause did not exist for his arrest and therefore the trial court erroneously denied his motion to quash his arrest and suppress the evidence acquired as a consequence of that arrest. Respondent asserts that this court cannot review this claim because the Illinois courts have already done so. It is not that simple.

Stone v. Powell, 428 U.S. 465, 482 (1976), held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone* did not spell out what was meant by "an opportunity for full and fair litigation" of a Fourth Amendment claim and how a federal court on habeas review is to determine whether

a petitioner has received it. Virtually the only elucidation was footnote 36, which appeared with the recapitulation of the language quoted above. That footnote read, in full: "*Cf. Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)." *Stone*, 428 U.S. at 494 n. 36.

Townsend addressed whether a federal district court must hold an evidentiary hearing to determine whether a confession had been coerced in violation of the Fifth Amendment. The Court stated:

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

Townsend, 372 U.S. at 312-13 (footnote omitted). While declining to "overly particularize" this test, the court continued:

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact- finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.

The Seventh Circuit has understood the Supreme Court's footnote in *Stone* as authorizing courts to look to the *Townsend* factors in determining whether the petitioner had a full and fair opportunity to litigate his Fourth Amendment claim. See *Turentine v. Miller*, 80 F.3d 222, 224 n. 1 (7th Cir. 1996). What is critical for our purposes is that the test is not merely procedural. It is not enough, as the state contends, that Petitioner had an opportunity to litigate; the second *Townsend* factor, whether the state court's factual determination is "fairly supported by the record as a whole," indicates that this court must, albeit deferentially, look at the evidence that supports the conclusion.

The Seventh Circuit has stated that a "full and fair" opportunity to litigate requires that "the state court has carefully and thoroughly analyzed the facts and applied the proper constitutional case law to the facts," *Terry v. Martin*, 120 F.3d 661, 663 (7th Cir. 1997), requiring a review of the decision's evidentiary basis. "[W]e cannot say that a state court has 'carefully and fully analyze[d]' the facts of a Fourth Amendment claim if its factual findings are not fairly supported by the record." *Weber v. Murphy*, 15 F.3d at 694 (7th Cir. 1994).[6] We therefore ask whether the Illinois courts'

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[6] The Eighth Circuit in *Willett v. Lockhart*, 37 F.3d 1265 (8th Cir. 1994), rejected incorporating the *Townsend* factors into the *Stone* analysis, holding that a federal court could not evaluate the evidence supporting the state court's conclusion. In *Turentine v. Miller*, 80 F.3d 222, 225-26 (7th Cir. 1996), the Seventh Circuit in turn rejected the Eight Circuit's "stricter standard":

> The *Weber* standard is not a "subversion of the *Stone* rule," see *Willett*, 37 F.3d at 1271, as the Eighth Circuit suggests. *Weber* does not require substantive review of every Fourth Amendment claim raised in a habeas petition. Rather, in *Weber* and the cases that preceded it, we have sought to explicate what the Su-

finding of probable cause for Petitioner's arrest is supported by the record, mindful of the requirement "that a state court's factual determinations are due a 'high deference.'" *Weber*, 15 F.3d at 694 (citing *Sumner v. Mata*, 455 U.S. 591, 598 (1982)).[7] If not, *Stone v. Powell* does not bar consideration of this claim.

At the time of Petitioner's trial and appeal, as today, it was clearly established that

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> preme Court recognized in *Stone* as a very narrow exception to the general rule that a habeas petitioner may not bring Fourth Amendment claims. We have consistently held that a claim is *Stone*-barred if the petitioner simply argues that the state court made a mistake in applying Fourth Amendment law.... Instead, habeas review of Fourth Amendment claims is reserved for instances where the state court made an egregious error (e.g., failed to apply Supreme Court precedent directly on point after the argument was clearly presented), thus effectively depriving the petitioner of the ability to vindicate his federal rights in state court. This is consistent with the understanding of "opportunity for full and fair litigation" adopted by several courts.... The *Weber* standard is not more than a restatement of the narrow exception set out in *Stone*, and we therefore decline Indiana's request to revisit our definition of "opportunity for full and fair litigation."

[7] *Weber* was decided prior to the enactment of the Antiterrorism and Effective Death penalty Act of 1996. Congress has since made explicit *Weber*'s "high deference" standard by stating that factual findings "shall be presumed to be correct," and "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

> [w]hether [an] arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

Beck v. Ohio, 379 U.S. 89, 91 (1964); *see also Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (same). It was also established that probable cause is not transferred by association—that simply being in the company of a person suspected of crime is not probable cause to search or arrest. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person"); *Sibron v. New York*, 392 U.S. 40, 62-63 (1968) (no probable cause to believe individual seen talking to a number of narcotics addicts was engaged in drug trafficking). Lopez's negotiation of checks stolen from the victim clearly established probable cause as to him, but merely being seen in Lopez's company would not establish probable cause as to Petitioner.

The Illinois Supreme Court in *Cabrera II* implicitly conceded this rule of law, but believed that the record showed something more: that the arresting officers were aware of Petitioner's recent burglary convictions.[8] If the police had known Petitioner was a proven burglar, his following Lopez as Lopez negotiated the stolen checks could raise

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[8] According to publicly available records kept by the Illinois Department of Corrections, Petitioner was on probation following convictions for burglary and attempted burglary at the time of the offenses in question.

an inference that he had something to do with the theft. But in a strong dissent Justice Seymour Simon pointed out that nothing in the record showed that the police were aware of Petitioner's criminal history at the time they went to his home to arrest him. Because the dispute is critical, we will recapitulate it in detail.

In determining that probable cause existed for Petitioner's arrest, the Illinois Supreme Court noted the following:

> The defendant seriously misstates the issue when he says it is simply whether the defendant's being with a person who purchased merchandise with a stolen traveler's check gave probable cause to arrest. It seems clear that the police had other significant information from which probable cause to arrest was reasonably inferred.
>
> Derrick Moore, from the "Different Circle" store, looked through approximately 200 police photographs before identifying a photograph of the defendant as one of the men who was present at the time the purchase was made with the stolen traveler's check. Too, Moore told the detectives that the defendant had a large scar on his neck; a scar that was not visible in the photograph. At trial prior to identifying the defendant's picture, Moore testified that, after speaking with the investigating officers, he had gone to a police station and "looked through pictures, mug shots." The defendant's attorney moved for a mistrial on the ground that the reference to "mug shots" was prejudicial. The motion was denied. Later when the prosecution was moving for the admission of various exhibits, including the police photograph of the defendant that Moore had picked out, Mr. Lyster, the defendant's attorney, objected to the photograph's admission. The record reads:
>
> "MR. RAAB [Prosecutor]: People's Exhibit Number 43 for identification, having been identified as a colored photograph of the defendant,

William Cabrera, being identified by Derrick Moore at Area 6 Violent Crimes vicinity on the 23rd of February, 1981; and also having been identified by Detective Thomas Sappanos as the photograph that was in fact identified by Derrick Moore on that day and at that place.

MR. LYSTER: Your Honor, I will object to that. *That is the mug shot. Of course, it has his breastplate in front of him, indicating his RIWR number on January 21, 1980.*

I think, obviously, it would be prejudicial for it to be admitted, even if it is altered or modified, or clipped, because you would further focus attention on the bottom photo by even covering it. In other words, if we covered the bottom of it with any kind of piece of paper. Obviously, you don't have to be—you know, all you have to do is be a Sam Spade to know what this photo is." (Emphasis added.)

The trial court, after telling the prosecutor, who was arguing for admission of the photograph, that the jury would be shown whatever exhibits were admitted in evidence, denied its admission. Thus, the officers had a Chicago police department mug shot of the defendant with an identification board, and as his attorney complained, the mug shot indicated his Chicago police department identification number and referred to January 21, 1980.

Detective Thomas Sappanos and Thomas Keane were the principal officers in the murder investigation, but at least two other officers were assigned to the investigation, Sappanos testified. Sappanos testified, too, that he prepared about four investigative reports prior to the defendant's arrest on February 24 and that he made a specific report on the identification of the defendant before he and Keane arrested him at 5523 North Kenmore Avenue in Chicago. It is apparent that the police, from the defendant's mug

shot with his name and the police identification number, were able to examine the Chicago police department reports regarding the defendant and could ascertain his record and address. Thus, they were able to arrest him at his apartment at 5523 North Kenmore Avenue in Chicago. As stated, Detective Sappanos testified that he prepared a report on the identification of the defendant before his arrest. He certainly would have examined the Chicago police department records of the defendant.

At the time of the defendant's arrest, it must be reasonably concluded that the detectives had knowledge of the defendant's entering and leaving the store with Lopez, the man who cashed the murder victim's check; that his Chicago police department mug shot, with his police identification number, had been identified by Moore; and that from the mug shot they ascertained the information appearing in the Chicago police department records regarding the defendant.

That information included a record of the defendant's convictions for burglary and attempted burglary. At the hearing on the defendant's motion to quash arrest and suppress evidence the State introduced copies of these convictions for burglary and attempted burglary.

Other information in the police department records which was available through the defendant's so-called "rap sheet" or criminal record appears in the record before us in the presentence investigation report. It discloses other burglary arrests, including one on January 21, 1980, which date the defendant's attorney said appeared on the defendant's mug shot together with his police department identification number.

Cabrera II, 508 N.E.2d at 712-713 (emphasis in original).

The problem, as Justice Simon pointed out, is that no one testified that the police ever looked up Petitioner's police

record. Because Sappanos prepared investigative reports, the majority opinion stated, he "certainly would have examined the Chicago police department records." But Sappanos did not testify that he did, nor even that it was standard procedure to do so.

Justice Simon pointed out that there is actually some evidence in the record suggesting that the police did *not* consult Chicago Police Department records before setting out to arrest Petitioner, because an examination of them shows that the last entry the police officers would have seen prior to Petitioner's arrest showed him living at 1230 W. Argyle, not 553 North Kenmore where he was arrested. *Cabrera II*, 508 N.E.2d at 713. Of course, this does not preclude the possibility that the officers reviewed Petitioner's criminal history and obtained his current address from another source. But the fact remains that nothing in the record indicates that the arresting officers knew of Petitioner's criminal history when he was arrested.

Justice Simon's dissent also noted that the State had admitted during oral argument that it was not in the record what police officers actually knew at the time they arrested Petitioner. *Id.* at 718. This is consistent with the State's brief in the Illinois Supreme Court, which relied solely on the evidence that Petitioner was shopping together with the individual who cashed the stolen traveler's checks. State's Ill. Sup. Ct. Br. at 25-26.[9]

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[9] Although the argument summary in the table of contents refers to Petitioner as "a known burglar," the text of the brief discussing the issue of probable cause does not refer to Petitioner's criminal history or how the arresting officers were supposed to have been aware of it. The State's primary argument was that Petitioner had waived the issue of lack of probable cause. State's Ill. Sup. Ct. Br. at 24. Since the Illi-

We respectfully disagree with the Illinois Supreme Court majority and find that the existence of probable cause is not supported by the record. The "record" cannot be understood to include plausible assumptions. It might be plausible to assume that a burglar with an extensive record would be known to every member of a small-town police department, but for a court to make that kind of assumption in the absence of testimony would derogate the Fourth Amendment.

Because we find that the finding of probable cause is not supported by the record, *Stone v. Powell* does not bar consideration of Petitioner's third claim, and this conclusion also requires that the petition be granted. Although the Illinois Supreme Court correctly identified the governing legal rule as set forth in *Beck*, it applied it unreasonably to the facts. See *Williams v. Taylor*, 529 U.S. 362, 407-408 (2000). The record shows only that the arresting officers knew that Petitioner had been identified by a store clerk as having accompanied someone who had purchased items with the victim's traveler's checks. This evidence is even less than in *Beck*, where the Supreme Court stated:

The record is meager, consisting only of the testimony of one of the arresting officers, given at the hearing on the motion to suppress. As to the officer's own knowledge of the petitioner before the arrest, the record shows no more than that the officer "had a police picture of him and knew what he looked like," and that the officer knew that the petitioner had "a record in connection with clearing house and scheme of chance." Beyond that, the officer testified only that he had "information" that he had "heard reports," that "someone specifically did relate that information," and that he "knew who that person was." There is nowhere in the re-

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nois Supreme Court reached the merits, that argument is irrelevant in this court.

cord any indication of what "information" or "reports" the officer had received, or, beyond what has been set out above, from what source the "information" and "reports" had come....

Beck, 379 U.S. at 94. The Court concluded that "[n]o decision of this Court has upheld the constitutional validity of a warrantless arrest with support so scant as this record presents." *Id.* 379 U.S. at 95. As it was established that simply being in the company of one who is a suspect does not constitute probable cause, *Ybarra*, 444 U.S. at 91, the Illinois' Supreme Court's application of established constitutional law was unreasonable.

4. Post-Conviction Relief

Petitioner's fourth claim takes issue with the dismissal of his petition for post-conviction relief. First, Petitioner argues that the Illinois legislature failed to provide him with adequate and meaningful notice of changes to the post-conviction relief statute that shortened the time in which a state prisoner must file his petition, and that the absence of such notice violated his Fourteenth Amendment right to due process.[10] Second, Petitioner claims that his failure to file a

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[10] At the time of Petitioner's conviction the limitations provision of the Post-Conviction Act, Ill.Rev.St. ch. 38 ¶ 122-1(c), read as follows:

> No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or issuance of the opinion from the Illinois Supreme Court or 6 months after the date of the order denying certiorari by the United States Supreme Court or the date for filing such petition if none is filed or 20 years from the date of conviction, whichever is later, unless the petitioner

timely post-conviction petition was the result of being denied access to a law library "near the time of the filing deadline," Pet. at 47, and because the Department of Corrections twice confiscated the papers of a "law clerk" assisting him with the petition, denying him his First Amendment right of access to the courts. Petitioner concludes by stating: "Based upon petitioner's inability to obtain state review of his post conviction petition as a result of 'direct arbitrary state' activity, this Court must hear the issues raised in petitioner's post-conviction petition." (Pet. at 48.)

These are not in themselves claims for habeas relief, since they have nothing to do with the lawfulness of Petitioner's conviction or sentence, but are offered as reasons for this court to consider the claims contained in Petitioner's untimely post-conviction petition.[11] Accepting these allegations as true, they do not permit the court to review the defaulted claims.

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alleges facts showing that the delay was not due to his culpable negligence.

Effective January 1, 1984, the 20-year period from date of conviction was shortened to 10 years. P.A. 86-1210, approved Aug. 30, 1990, reduced the limitations period to 3 years, effective January 2, 1992.

[11] Petitioner asserted the following claims in his post-conviction petition: (1) ineffective assistance of trial counsel; (2) the trial court improperly considered a factor in aggravation when imposing an extended sentence; (3) ineffective assistance of appellate counsel; (4) petitioner was convicted based on evidence seized in an unlawful arrest; and (5) the trial court did not sentence petitioner with the objective of restoring him to useful citizenship.

If state courts refuse to review a petitioner's claims as a consequence of the petitioner's failure to comply with a state procedural rule that is independent of the federal question and adequate to support the judgment, those claims are procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Failure to comply with the limitations period of the Illinois Post Conviction Act is such an independent and adequate state ground. *Barksdale v. Lane*, 957 F.2d 379, 382 (7th Cir. 1992), *cert. denied sub nom. Barksdale v. Peters*, 506 U.S. 890 (1992). A federal court may not review a defaulted claim unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. A "fundamental miscarriage of justice" is not the violation of a constitutional rule, but the probability that an innocent person has been convicted. As it requires persuasive new evidence of actual innocence, it is inapplicable here. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). Petitioner has not show acceptable cause for his default.

The statute that barred Petitioner's petition by reducing the limitations period to three years, P.A. 86-1210, was approved August 30, 1990, but only became effective January 1, 1992. Petitioner cannot argue that the statute was unconstitutionally retroactive. After August 30, 1990, Petitioner could not rely on being able to file ten years after his conviction. Petitioner complains that he did not receive "adequate and meaningful" notice of this legislative act, but the Constitution does not require advance notice to prisoners (or anyone else) of changes in the law. *See Torres v. Immigration and Naturalization Service*, 144 F.3d 472 (7th Cir. 1998).

The Seventh Circuit's opinion in *Barksdale*, 957 F.2d at 382-83, addressed the 1984 reduction of the limitations

period from twenty years to ten, holding that it did not constitute "cause" excusing the petitioner's failure to file a timely post-conviction petition. That holding is dispositive here.

Petitioner cannot avoid default by stepping back and alleging that he had good cause for failing to file on time. As *Barksdale* pointed out, the Illinois Post-Conviction Act permits a petitioner to avoid the limitations bar if the petitioner "alleges facts showing that the delay was not due to his culpable negligence." In finding Petitioner's post-conviction petition untimely, the Illinois courts necessarily found that Petitioner had not made allegations that, if true, would establish his lack of culpable negligence. This finding is itself an independent determination under state law and binding on this court. *Barksdale*, 957 F.2d at 383-84; *see also Starks v. Welborn*, No. 99 C 1117, 1999 WL 674754 (N.D. Ill. 1999) (Castillo, J.) at *4.

Further, "cause" "must be something external to the petitioner, something that cannot fairly be attributed to him." *Coleman*, 501 U.S. at 753. Because there is no right to counsel in post-conviction proceedings, the failings of a post-conviction attorney are attributed to the petitioner; an attorney's mistakes or blunders in failing to file on time do not constitute "cause." *Coleman*, 501 U.S. at 752-53. Neither do the mistakes of a prison law clerk. *United States ex rel. Williams v. Cowan*, No. 98 C 3204, 2001 WL 800085 (Grady, J.).

Petitioner alleges that acts of the State, in keeping him from the law library for a time and confiscating papers used by the inmate law clerk, constitute an independent constitutional violation and so should not be subject to the same rule. But Petitioner does not allege that either action was intended to prevent his access to the court, and accidental deprivations that result in interference with an inmate's access to

the courts are not constitutional violations. *See Kincaid v. Vail*, 969 F.2d 594, 602 (7th Cir. 1992), *cert. denied* sub nom. *Sceifers v. Vail*, 506 U.S. 1062 (1993). In the absence of a showing of intentional interference with a petitioner's access to the courts, or a showing that it was impossible (not merely more difficult) for the petitioner to have prepared the petition without state assistance (as in the case of a petitioner who speaks no English or is mentally incompetent, for example), the risk that some vicissitude will thwart the timely filing of a post-conviction petition is fairly attributed to the petitioner, not the state. Petitioner has not alleged that he was denied access to the law library for a significant amount of time. *Cf. Tellez v. Gilmore*, No. 97 C 3228, 1998 WL 89336 (N.D. Ill. Feb. 18, 1998) (petitioner who was in solitary confinement and was provided with limited access to a law library did not sufficiently show that he could not have filed a petition for post-conviction relief). Direct review of Petitioner's conviction ended on November 2, 1987, when the U.S. Supreme Court denied certiorari. Even with the reduced limitations period, Petitioner had slightly more than four years to prepare and file his post-conviction petition, and cannot claim the State prevented him from filing.

5. Ineffective Assistance of Appellate Counsel

Petitioner raises as a claim for habeas relief the ineffective assistance of his appellate counsel. Like the foregoing claims, this is not itself grounds for habeas relief, but would permit this court to consider constitutional errors that could have been, but were not, raised in Petitioner's direct appeal. Petitioner raises at least one such claim. In his concurring opinion in *Cabrera II*, 508 N.E.2d at 717, Chief Justice Clark noted that Petitioner's conviction was tainted by a separate Fourth Amendment violation: apart from the alleged lack of probable cause, petitioner's arrest in his home without a warrant was unlawful under *Payton v. New York*, 445 U.S. 573 (1980). Chief Justice Clark concurred in the

court's opinion, however, because the *Payton* issue had been waived by failing to raise it on appeal.

In his post-conviction petition, Petitioner claimed that failing to raise the issue amounted to ineffective assistance of appellate counsel. Had the issue of ineffective assistance of appellate counsel been preserved, Petitioner could have raised it in this court, and a finding that his appellate counsel had been ineffective would have permitted this court to reach the underlying *Payton* claim. However, our finding that the claims Petitioner sought to raise in his post-conviction petition are defaulted dooms this claim as well.

6. The Illinois Accountability Statute

Petitioner argues that the Illinois statutory provision by which a person may be held accountable for the acts of another is unconstitutional. That provision, formerly Ill. Rev. Stat. 1981, ch. 38, par. 5-2©, now codified at 720 ILCS 5/5-2©, states that "[a] person is legally accountable for the conduct of another when.... © Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." Illinois decisions have interpreted this to mean that a person who joins with another in a "common design" to commit an unlawful act is accountable for any crimes that occur in furtherance of that design, whether specifically intended by the co-participant or not. *See People v. Cooper*, 194 Ill.2d 419, 743 N.E.2d 32 (2000); *People v. Taylor*, 164 Ill.2d 131, 646 N.E.2d 567 (1995); *see also Brumley v. DeTella*, 83 F.3d 856, 863 (7th Cir. 1996).

Petitioner cites no authority for the proposition that the Illinois accountability statute is unconstitutional. While the Constitution requires the state to prove a defendant guilty beyond a reasonable doubt of all elements of a criminal offense, defining the offense is a matter of state law for state

legislatures and state courts. *Burris v. Farley*, 51 F.3d 655, 659-60 (7th Cir. 1995). The state produced evidence from which the jury could find that Lopez committed murder and that Petitioner had the requisite relationship to him to be held responsible for it. In any event, this claim was never presented to the Illinois courts and is accordingly defaulted.

CONCLUSION

All of Petitioner's claims are defaulted, meritless, or both, except his claim that the police lacked probable cause for his arrest and his claim that the jury could not properly have found him guilty beyond a reasonable doubt of burglary. These are "errors that undermine confidence in the fundamental fairness of the state adjudication," and that justify the issuance of the federal writ. *Williams v. Taylor*, 529 U.S. 362, 375 (2000). The court grants Petitioner's application for writ of habeas corpus with respect to Petitioner's 1983 convictions for murder, robbery and burglary, conditioned on the invalidation of the other, presumptively lawful, sentences authorizing his continued confinement. Petitioner's 1983 convictions for murder, robbery and burglary are declared to be void and of no effect unless the State of Illinois retries petitioner within 120 days of this order.

IT IS SO ORDERED

Date: October 30, 2001

Enter: /s/Joan H. Lefkow
JOAN HUMPHREY LEFKOW
United States District Judge

APPENDIX C

Supreme Court of Illinois.

The PEOPLE of the State of Illinois, Appellee,

v.

William CABRERA, Appellant.

No. 62357.

April 16, 1987.

Rehearing Denied June 5, 1987.

Justice WARD delivered the opinion of the court:

The defendant, William Cabrera, was found guilty of murder, robbery and burglary by a jury in the circuit court of Cook County (Ill.Rev.Stat.1981, ch. 38, pars. 9-1(a)(1), 18-1, 19-1) and was sentenced to a term of 60 years for murder and to extended-term concurrent sentences of 14 years for burglary and robbery. The appellate court affirmed the convictions but reduced the defendant's sentence for burglary and robbery to seven years. (134 Ill.App.3d 526, 89 Ill.Dec. 427, 480 N.E.2d 1170.) We granted the defendant's petition for leave to appeal (103 Ill.2d R. 315).

On this appeal the defendant claims (1) the trial court erred in finding that the police had probable cause to arrest him; (2) he was denied the right to be tried by a fair and impartial jury; (3) the State failed to prove him guilty of burglary beyond a reasonable doubt; and (4) the trial court abused discretion in imposing a 60-year extended-term sentence.

On February 12, 1981, Yoel A. Keena, a 74-year-old man, was found dead in a back room of the Assyrian National Foundation (the Foundation) at 1475 West Balmoral Street in Chicago, where he had been temporarily living. Investigating Detective Thomas Sappanos found that entry had

been made through a broken window in the office of the foundation and that the premises had been ransacked and a cash box broken into. Sappanos also discovered a receipt for Thomas Cook traveler's checks with the name of the victim; however, no checks were found. The next day, February 13, Sappanos spoke with Dr. Shaku Teas concerning the results of the autopsy she performed on the victim and was informed that the cause of death was "[s]trangulation and subdural hemmorrhage [, bleeding underneath the fibrous membrane forming the outermost layer covering of the brain,] due to blunt trauma."

Learning that some of the victim's traveler's checks had been used to make purchases of clothing, Detectives Sappanos and Thomas Keane, on February 20, went to the "Different Circle" store in the Century Mall in Chicago. There they questioned Derrick Moore, assistant sales manager, about the purchase made with the stolen checks. Moore informed them that three men came to the store at about 8 p.m. on February 11; he assisted two of the men while they browsed through the store, and a saleslady assisted the third man (whom Moore later identified on April 7, as Ruben Lopez) in the purchase of a red jacket, a white shirt with a Popeye logo, and a necktie. The purchase was made with a Thomas Cook traveler's check, and an identification card bearing Lopez' picture was used. The three men remained in the store for about 20 or 30 minutes. Moore watched as they went into the "Saturday's Generation," a store across from the "Different Circle." Shortly thereafter, Moore observed the three men leaving that store carrying two shopping bags, one with the name "Different Circle," the other with "Saturday's Generation."

On February 23 Moore, after looking through approximately 200 police photographs or "mug shots" at the Chicago Area 6 police station, identified a photograph of the defendant as a picture of one of the men present in the store

at the cashing of the check. Moore also told the detectives that the defendant had "a large scar going from his ear down in a diagonal line towards his neck" which was not shown in the photograph. That evening, Sappanos and Keane went to the defendant's apartment at 5523 North Kenmore in Chicago, but he was not there.

The next day at about 5:30 p.m., Sappanos received a telephone call at the police station from a clerk-receptionist at the defendant's apartment house, informing him that the defendant had just returned. Sappanos and Keane, without an arrest or search warrant, immediately went to the defendant's apartment, knocked at his door and identified themselves. The defendant, wearing only gym shorts and looking as though he had just taken a bath or a shower, opened the door. When he did, the detectives observed the scar on his neck and informed him that he was under arrest. They gave him the *Miranda* rights and told him that they "were investigating a homicide, [and] the fact that he had been identified as a person being involved in cashing the [traveler's] checks from the homicide." Upon the defendant's consenting, the detectives made a cursory search of the apartment; nothing was taken. The defendant later claimed that the officers unlawfully entered his apartment, came into his bathroom while he was taking a bath, and told him he was under arrest for murder and burglary. While he was dressing, the detectives searched his apartment without his consent, taking three photos of his girlfriend, the title to his car, his driver's license, and his social security card. The detectives denied these allegations.

The defendant was then taken to the Area 6 police station, where, at approximately 6:30 p.m., he was placed in an interview room. In the room, Detective Keane again informed the defendant of his *Miranda* rights. Sappanos then questioned the defendant about the stolen traveler's checks and the murder, but the defendant denied knowledge of either

incident. The detectives then left the defendant in the interview room, returning at approximately 9 p.m. with a sandwich and drink for the defendant. Shortly thereafter, Detectives Sappanos, Keane and Chris Grogman asked the defendant to sign a consent form to search his apartment. The defendant signed the form and remained in the interview room. During the search of his apartment, the detectives did not find anything related to the murder or cashing of the traveler's checks.

At about 5 p.m. on February 25, Sappanos and Keane entered the interview room to question the defendant, and again prior to questioning, he was given his *Miranda* rights. The defendant told the detectives that he had not been truthful about the check-cashing situation. At first, the defendant told the detectives that Lopez had approached him with the checks, saying that he "had found the traveler's checks in the alley." The defendant then changed his story and said that Lopez informed him that he had obtained the checks by "ripping off a place" next to a dog-grooming parlor, which, as Sappanos testified, was next door to the Foundation. Lopez and he then went to the shopping mall "and cashed the checks." Subsequent to the questioning, Detectives Sappanos, Keane and Grogman left the station with the defendant, as he agreed to show them where Lopez lived.

Arriving at the 1400 block of West Summerdale in Chicago, Sappanos and Keane left the squad car to locate Lopez' apartment, while Grogman remained with the defendant. Upon finding the apartment, Sappanos and Keane obtained, from Lopez' mother and sister, a signed consent to search the apartment. Sappanos found a white shirt with a Popeye logo and took it to the squad car where the defendant identified it as one of the items purchased with the stolen traveler's checks. Grogman took the defendant back to the police station, then returned to Lopez' apartment to continue the search. He found an identification card, to which a pic-

ture of Lopez had been affixed, that was later identified by Derrick Moore as the card used by Lopez in cashing the traveler's checks. Sappanos, Keane and Grogman went back to the station, and two other detectives completed the search. They found the red jacket that had been purchased at the "Different Circle" store.

Early on February 26, after providing the defendant with a sandwich and soda, Sappanos and Keane gave the defendant his *Miranda* rights another time. Again the defendant told the detectives that he had not been totally truthful about the homicide incident. He told them that on the night before the checks were cashed he and Lopez had entered the Foundation by going through a broken window in the office. Once inside, Lopez told him to "search in the front" of the Foundation. There, he found a metal cash box, pried it open, and took $40 which was in the box. The defendant said that, while he was in the front office, Lopez went to the back of the Foundation where he found the victim, who had been awakened by the intrusion. The defendant saw Lopez strike the victim twice; however, the weapon was not described. (The autopsy referred to "strangulation" and "blunt trauma.") The defendant then went to the back room and searched the victim's pockets, where he found the victim's traveler's checks. He and Lopez then left the premises, Lopez taking the traveler's checks from the defendant, and the defendant keeping the $40. The defendant stated that on the following day Lopez told him that he was going to cash the traveler's checks and that if he, the defendant, would come along, he would buy something for him (the defendant). The defendant said he agreed and then gave Lopez $20 of the $40 dollars taken from the cash box. The defendant stated that several items of clothing were purchased with the checks, including a red jacket.

After the defendant's statement to them, the detectives called in an assistant State's Attorney to take the con-

fession. Before taking the confession, the assistant State's Attorney gave the defendant the *Miranda* rights, which the defendant indicated he understood. In his confession the defendant repeated what he had told Detectives Sappanos and Keane. However, he added that Lopez, using the stolen checks, bought him a pair of yellow corduroy pants and a pair of purple and black dress pants that he had pointed out to Lopez in the "Different Circle" store. (Apparently the defendant erred in this, as the record indicates that the pants were purchased from the "Saturday's Generation" store.) Later that morning, the defendant signed his confession, initialed each of its pages and corrected an error in the transcription of it. A few hours later, the defendant signed another consent form, agreeing to a second search of his apartment. That search produced, as Sappanos testified, the two pairs of pants Lopez had bought for the defendant.

The defendant does not contest the trial court's determination that there were exigent circumstances at the time of his arrest so as to justify the warrantless arrest. Nor does he challenge the finding of voluntariness of his confession, and he acknowledges that numerous times he was given his rights under *Miranda*.

The defendant first argues that the trial court erred in denying the motion to quash his arrest for lack of probable cause. Citing *People v. Creach* (1980), 79 Ill.2d 96, 37 Ill.Dec. 338, 402 N.E.2d 228, and *People v. Carnivale* (1975), 61 Ill.2d 57, 329 N.E.2d 193, the defendant says that the question is whether probable cause to arrest him arose merely because he was in the presence of a person who had used stolen traveler's checks in making a purchase, and for whom the police had probable cause to arrest. He says there was no probable cause to arrest and that all statements and physical evidence obtained by exploitation of his illegal arrest must be suppressed. Too, the defendant notes that the trial court's statement that the defendant was "the person that

passed the traveler's check belonging to the deceased," is in direct contradiction to Derrick Moore's trial testimony that the defendant was not the person who made the purchase with the victim's traveler's check. The State, citing *People v. Pickett* (1973), 54 Ill.2d 280, 296 N.E.2d 856, argues that the defendant has waived the issue of probable cause by failing to raise it at trial or in his post-trial motion for a new trial. We consider, however, that the record adequately shows that the defendant preserved, for review, the issue of probable cause. We need not address the defendant's argument that the trial court erred in stating that the defendant made the purchase with the victim's check, for there was probable cause to arrest on wholly independent grounds.

"Probable cause exists in the objective sense if'" * * * the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a man of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense.'" [Citations.] This standard requires more than mere suspicion, but it does not require the arresting officers to have in their hands evidence sufficient to convict the defendant. The courts, in striking a balance between the need to protect citizens from invasions of their privacy at the whim of police officers and the countervailing need to allow leeway for efficient enforcement of the laws, are sensitive to the fact that policemen must often make their decisions to arrest or not to arrest under ambiguous circumstances and must exercise their judgment, at the risk of making a mistake. 'In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' [Citation.]" *People v. Moody* (1983), 94 Ill.2d 1, 7-8, 67 Ill.Dec. 795, 445 N.E.2d 275.

In reviewing a trial court's denial of a defendant's motion to quash an arrest for lack of probable cause, this court will not disturb a trial court's finding of probable cause to arrest unless that finding was manifestly erroneous. *People v. Clay* (1973), 55 Ill.2d 501, 505, 304 N.E.2d 280; *People v. Summers* (1981), 100 Ill.App.3d 170, 175, 55 Ill.Dec. 612, 426 N.E.2d 937; *People v. Calderon* (1980), 85 Ill.App.3d 1030, 1036, 41 Ill.Dec. 342, 407 N.E.2d 840.

The defendant seriously misstates the issue when he says it is simply whether the defendant's being with a person who purchased merchandise with a stolen traveler's check gave probable cause to arrest. It seems clear that the police had other significant information from which probable cause to arrest was reasonably inferred.

Derrick Moore, from the "Different Circle" store, looked through approximately 200 police photographs before identifying a photograph of the defendant as one of the men who was present at the time the purchase was made with the stolen traveler's check. Too, Moore told the detectives that the defendant had a large scar on his neck; a scar that was not visible in the photograph. At trial prior to identifying the defendant's picture, Moore testified that, after speaking with the investigating officers, he had gone to a police station and "looked through pictures, mug shots." The defendant's attorney moved for a mistrial on the ground that the reference to "mug shots" was prejudicial. The motion was denied. Later when the prosecution was moving for the admission of various exhibits, including the police photograph of the defendant that Moore had picked out, Mr. Lyster, the defendant's attorney, objected to the photograph's admission. The record reads:

"MR. RAAB [Prosecutor]: People's Exhibit Number 43 for identification, having been identified as a colored photograph of the defendant, William Cabrera, being identified

by Derrick Moore at Area 6 Violent Crimes vicinity on the 23rd of February, 1981; and also having been identified by Detective Thomas Sappanos as the photograph that was in fact identified by Derrick Moore on that day and at that place.

MR. LYSTER: Your Honor, I will object to that. *That is the mug shot. Of course, it has his breastplate in front of him, indicating his RIWR number on January 21, 1980.* I think, obviously, it would be prejudicial for it to be admitted, even if it is altered or modified, or clipped, because you would further focus attention on the bottom photo by even covering it. In other words, if we covered the bottom of it with any kind of piece of paper. Obviously, you don't have to be—you know, all you have to do is be a Sam Spade to know what this photo is." (Emphasis added.)

The trial court, after telling the prosecutor, who was arguing for admission of the photograph, that the jury would be shown whatever exhibits were admitted in evidence, denied its admission. Thus, the officers had a Chicago police department mug shot of the defendant with an identification board, and as his attorney complained, the mug shot indicated his Chicago police department identification number and referred to January 21, 1980.

Detective Thomas Sappanos and Thomas Keane were the principal officers in the murder investigation, but at least two other officers were assigned to the investigation, Sappanos testified. Sappanos testified, too, that he prepared about four investigative reports prior to the defendant's arrest on February 24 and that he made a specific report on the identification of the defendant before he and Keane arrested him at 5523 North Kenmore Avenue in Chicago. It is apparent that the police, from the defendant's mug shot with his name and the police identification number, were able to examine the Chicago police department reports regarding the

defendant and could ascertain his record and address. Thus, they were able to arrest him at his apartment at 5523 North Kenmore Avenue in Chicago. As stated, Detective Sappanos testified that he prepared a report on the identification of the defendant before his arrest. He certainly would have examined the Chicago police department records of the defendant.

At the time of the defendant's arrest, it must be reasonably concluded that the detectives had knowledge of the defendant's entering and leaving the store with Lopez, the man who cashed the murder victim's check; that his Chicago police department mug shot, with his police identification number, had been identified by Moore; and that from the mug shot they ascertained the information appearing in the Chicago police department records regarding the defendant.

That information included a record of the defendant's convictions for burglary and attempted burglary. At the hearing on the defendant's motion to quash arrest and suppress evidence the State introduced copies of these convictions for burglary and attempted burglary.

Other information in the police department records which was available through the defendant's so-called "rap sheet" or criminal record appears in the record before us in the presentence investigation report. It discloses other burglary arrests, including one on January 21, 1980, which date the defendant's attorney said appeared on the defendant's mug shot together with his police department identification number.

We cannot say that the trial court's finding of probable cause was manifestly erroneous.

Secondly, the defendant contends that he was denied the right to be tried by a fair and impartial jury because, during the polling of the jurors, the trial court did not question a

juror, Ms. Ciancanelli, when she asked whether she had to answer yes or no to the court's question whether the verdict of guilty was her verdict.

After the jury announced its verdict finding the defendant guilty of murder, burglary and robbery, the trial court, at the defendant's request, polled the jurors. The court questioned juror Ciancanelli:

"THE COURT: Was this and is this now your verdict, Miss Cancinelli [*sic*]?

MS. CANCINELLI [*sic*]: Can I say what I have to say, or do I have to give a yes, or no answer?

THE COURT: I want a yes or no answer. Was this and is this now your verdict?

MS. CANCINELLI [*sic*]: I found in my own person mind—

THE COURT: I said I want a yes or no answer. Was this and is this now your verdict?

MS. CANCINELLI [*sic*]: Yes."

Upon completion of the polling, the defendant asked the court to inquire of Ms. Ciancanelli, saying it was "obvious she wanted to say more than a yes or no answer." The trial court denied the defendant's request, agreeing with the State that it is not the duty of the court to delve into the jurors' decision- making process, and that the court had given the jurors sufficient opportunity to state whether they were in agreement or disagreement with the jury's verdict.

The defendant later moved for a mistrial on the ground that the trial court erred in not allowing Ms. Ciacanelli to explain her verdict. The defendant argued that a

sworn statement of Ms. Ciancanelli, taken shortly after dismissal of the jury, indicated a recantation of her verdict as to the murder charge, and that the court should declare a mistrial. In denying the defendant's motion, the trial court said that it had reviewed the record of the polling of Ms. Ciancanelli and her statement, and as she had stated when questioned that the verdict of guilty was her verdict, a statement made by her after the jury had been discharged would not be considered.

"I think the record is clear, and I would, without a moment's hesitation, declare a mistrial if I thought that that juror wanted to recant her verdict when she was in the jury box. But once judgement [sic] is entered, and I did not have the impression she wanted to recant her verdict, I was very careful not to do anything to influence her one way or the other." (Emphasis added.)

"'The polling of a jury is intended "to ascertain whether any juror had been coerced into agreeing upon a verdict—coerced by his associate jurors." [Citation.] While polling the jury, a trial court must be careful not to hinder a juror's expression of dissent.' [Citation.]" (*People v. Williams* (1983), 97 Ill.2d 252, 307, 73 Ill.Dec. 360, 454 N.E.2d 220.) The trial judge, in determining whether a juror has freely assented to the verdict, not only hears the juror's response, but observes the juror's demeanor and tone of voice during the course of the polling of the jury. (*People v. Kellogg* (1979), 77 Ill.2d 524, 529, 34 Ill.Dec. 163, 397 N.E.2d 835; *People v. Herron* (1975), 30 Ill.App.3d 788, 792, 332 N.E.2d 623.) A trial court's determination as to a juror's voluntariness of his assent to the verdict will not be set aside unless the trial court's conclusion is clearly unreasonable. *People v. Herron* (1975), 30 Ill.App.3d 788, 792, 332 N.E.2d 623. See also *People v. Hill* (1973), 14 Ill.App.3d 20, 302 N.E.2d 373; *People v. Riddle* (1977), 49 Ill.App.3d 46, 6

Ill.Dec. 934, 363 N.E.2d 881; *People v. Gardner* (1976), 40 Ill.App.3d 700, 352 N.E.2d 448.

It cannot be said that the determination of the trial judge here that the juror voluntarily assented to the verdict and did not wish to repudiate it is clearly unreasonable. When Ms. Ciancanelli understood that she was to respond with a yes or no answer, she unequivocally answered yes when the judge inquired: "Was this and is this now your verdict?" The situations in *People v. Kellogg* (1979), 77 Ill.2d 524, 34 Ill.Dec. 163, 397 N.E.2d 835, and *People ex rel. Paul v. Harvey* (1972), 9 Ill.App.3d 209, 292 N.E.2d 124, which decisions the defendant cites, clearly are distinguishable. In *Kellogg* the juror inquired of the court as to whether she might change her vote, and in *Harvey* the juror, when asked if the verdict was his, responded: "Well, it wasn't exactly, no."

The defendant also contends that the statement of Ms. Ciancanelli taken after the dismissal of the jury should have been considered by the trial court. We consider, however, that the trial court's conduct was unquestionably correct. It is clear that a statement by a juror, taken after the jury has rendered its verdict, has been polled in open court, and has been discharged, will not be admitted to impeach a juror's verdict. (*People v. Preston* (1979), 76 Ill.2d 274, 288-89, 29 Ill.Dec. 96, 391 N.E.2d 359.) In *Preston* this court stated that *United States v. Schroeder* (8th Cir. 1970), 433 F.2d 846, *cert. denied* (1971), 401 U.S. 943, 91 S.Ct. 951, 28 L.Ed.2d 224, was pertinent, and said:

"There a juror signed an affidavit stating that he did not believe that the defendant was guilty and had voted for conviction against his will, although the juror had answered in the affirmative when polled on his guilty verdict. A claim that the verdict against the defendant was not unanimous was rejected by the court. It stated:

'After a jury has given its verdict, has been polled in open court and has been discharged, an individual juror's change of mind or claim that he was mistaken or unwilling in his assent to the verdict comes too late. Under the circumstances of this case, the verdict must stand unimpeached.' (433 F.2d 846, 851.)" *People v. Preston* (1979), 76 Ill.2d 274, 288-89, 29 Ill.Dec. 96, 391 N.E.2d 359. Even if we were to consider Ms. Ciancanelli's statement, our review indicates that there is no showing in that statement that, at the time Ms. Ciancanelli was polled, she wanted to change her verdict. Rather her statement indicated that it was not until after the jury had been dismissed that she indicated she wanted to recant her verdict. Therefore, consideration of her statement would not change our conclusion that the defendant was convicted by a unanimous jury.

The defendant contends too that the State failed to prove beyond a reasonable doubt that he committed the offense of burglary by entering, without authority, the Foundation with the intent to commit robbery.

Section 19-1(a) of the Criminal Code of 1961 (Ill.Rev.Stat.1981, ch. 38, par. 19-1(a)) provides in part:

"A person commits burglary when without authority he knowingly enters * * * a building * * * with the intent to commit therein a felony or theft."

Here the defendant was charged with the commission of the offense of burglary "in that he, without authority, knowingly entered into a building, to wit: the dwelling of Yoel Keena with the intent to commit the offense of robbery, therein." Section 18-1(a) of the Criminal Code (Ill.Rev.Stat.1981, ch. 38, par. 18-1(a)) provides:

"A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force."

To commit burglary there must be an unlawful entry into a building with the intent to commit a felony or theft. (*People v. Peck* (1963), 29 Ill.2d 480, 484, 194 N.E.2d 245; *People v. Scott* (1969), 43 Ill.2d 135, 144, 251 N.E.2d 190.) "The felonious intent of an accused may be inferred from his words, action, violence and other conduct and it is within the province of the jury to consider all the facts and circumstances of the case in determining the question of intent." (*People v. Maffioli* (1950), 406 Ill. 315, 320, 94 N.E.2d 191; *People v. Soznowski* (1961), 22 Ill.2d 540, 543, 177 N.E.2d 146.) Circumstances include "the time, place and manner of entry into the premises, the defendant's activity within the premises, and any alternative explanations offered for his presence." *People v. Richardson* (1984), 104 Ill.2d 8, 13, 83 Ill.Dec. 604, 470 N.E.2d 1024.

Contentions similar to those of the defendant were made in *People v. Zuniga* (1981), 99 Ill.App.3d 396, 54 Ill.Dec. 877, 425 N.E.2d 1094. There the defendant, in the early evening hours, entered a church basement through a broken window. A priest, noticing the broken window, entered the church and went to the basement. The defendant struck the priest with a metal rod and demanded his money. The priest managed to elude the defendant and call for help.

On appeal, the defendant in *Zuniga* argued that his burglary conviction should be reversed as the State failed to prove that he had entered the church with the intent to commit armed robbery. The court stated that the offense of burglary was complete upon the defendant's entry into a building with the requisite intent; and that the elements of the offense, including the defendant's intent, could be inferred from the facts and circumstances in evidence. (*People v.*

Zuniga (1981), 99 Ill.App.3d 396, 400, 54 Ill.Dec. 877, 425 N.E.2d 1094.) The court, in affirming the defendant's conviction, held that the testimony presented was sufficient to create a question for the jury and that the evidence "was not so palpably contrary to the verdict or so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of defendant's guilt." *People v. Zuniga* (1981), 99 Ill.App.3d 396, 400, 54 Ill.Dec. 877, 425 N.E.2d 1094.

The evidence here resembles what occurred in *People v. Zuniga*. As stated above, it was the province of the jury to determine the question of intent, and that determination will not be disturbed on review unless the evidence is so improbable as to cast reasonable doubt on the guilt of the defendant. *People v. Stewart* (1984), 105 Ill.2d 22, 66, 85 Ill.Dec. 241, 473 N.E.2d 840; *People v. Zuniga* (1981), 99 Ill.App.3d 396, 400, 54 Ill.Dec. 877, 425 N.E.2d 1094; *People v. Davis* (1977), 54 Ill.App.3d 517, 524, 12 Ill.Dec. 362, 369 N.E.2d 1376.

The final argument of the defendant is that the trial court abused discretion in imposing an extended-term sentence of 60 years, as the victim's murder was not "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." Ill.Rev.Stat.1981, ch. 38, par. 1005-5-3.2(b)(2).

We recently observed in *People v. Barrios* (1986), 114 Ill.2d 265, 277, 102 Ill.Dec. 522, 500 N.E.2d 415, that this court has consistently held that "'where it is claimed that the punishment imposed is excessive, although within the limitations prescribed by the legislature, that sentence should not be disturbed unless it is greatly at variance with the purpose and spirit of the law or manifestly in excess of the proscriptions of section 11 of article II of the [1870] Illinois constitution which requires that all penalties should be proportioned to the nature of the offense. The trial court is nor-

mally in a superior position during the trial and the hearing in aggravation and mitigation to make a sound determination as to the punishment to be imposed than are courts of review.' [Citations.]" Unless there has been an abuse of discretion by the trial court, we will not disturb the defendant's sentence. *People v. Perruquet* (1977), 68 Ill.2d 149, 154, 11 Ill.Dec. 274, 368 N.E.2d 882.

Sections 5-5-3.2(b)(1) and (b)(2) of the Unified Code of Corrections provide:

"[T]he following factors may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 upon any offender who was at least 17 years old on the date the crime was committed:

(1) When a defendant is convicted of any felony, after having been previously convicted in Illinois of the same or greater class felony, within 10 years, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts; or

(2) When a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty; * * *." (Ill.Rev.Stat.1981, ch. 38, pars. 1005-5-3.2(b)(1), (b)(2).)

An extended-term sentence that may be imposed for murder upon consideration of the statutory factors is a term of not less than 40 years and not more than 80 years. Ill.Rev.Stat.1981, ch. 38, par. 1005-8-2(a)(1).

The trial court, in imposing an extended-term sentence here, stated:

"On the murder, I'm finding that the defendant has previously been convicted of [f]elonies and that this particular murder was accompanied by exceptionally brutal or heinous treatment indicative of wanton cruelty. The court specifically recalls the pictures that showed the blood splattered on the wall, on the floor and I specifically recall the condition of the victim's body, therefore, I'm sentencing the defendant to a term of incarceration with the Illinois Department of Corrections of 60 years * * *."

We have reviewed the trial court's sentencing of the defendant; the testimony of Dr. Teas regarding the autopsy of the victim, including the cause of death; the photographs of the victim; and the scene of the crime. On this record it cannot be said that the trial court abused discretion in imposing an extended-term sentence of 60 years for this brutal murder for gain.

For the reasons given, the judgment of the appellate court is affirmed.

Judgement affirmed.

Justice GOLDENHERSH took no part in the consideration or decision of this case.

Chief Justice CLARK, specially concurring:

I write separately because I believe that the police illegally arrested the defendant in his home, without first seeking an arrest warrant, and without a showing of exigent circumstances. I concur only because the defendant failed to raise this issue in his briefs to us and to the appellate court, although it was included in his original motion to suppress. 116 Ill.2d at 485, 108 Ill.Dec. at 400, 508 N.E.2d at 711.

Under *Payton v. New York* (1980), 445 U.S. 573, 574-75, 602-03, 100 S.Ct. 1371, 1374-75, 1388, 63 L.Ed.2d 639, 643-44, 660-61, the police may not, absent exigent circumstances, enter a suspect's home to arrest the suspect without a warrant for his arrest and reason to believe that he is within his home. According to the majority's own account of the facts, the police went to the defendant's apartment, knocked on the door, identified themselves, and then arrested the defendant when he opened the door to them. There is no showing that the defendant consented to their entry into his apartment prior to his arrest. This was an at-home arrest.

It was not justified by exigent circumstances. An unnecessary and unjustified delay of at least 24 hours elapsed between the time the police supposedly obtained probable cause from Derrick Moore, on February 23, and their arrest of the defendant on the evening of February 24. Under *Payton*, the police need not obtain a search warrant to enter the defendant's residence if they possess an arrest warrant for the defendant and probable cause to believe that the defendant is within the premises. (*United States v. Clifford* (8th Cir. 1981), 664 F.2d 1090, 1093.) Thus the police in this case could have obtained a warrant for the defendant's arrest at any time between obtaining probable cause to arrest on February 23, and arresting the defendant on the evening of February 24. Nothing excuses their failure to do so.

Moreover, it seems clear to me that the defendant's statements and consents were not given of "sufficient free will as to purge the primary taint of the unlawful arrest." (*Brown v. Illinois* (1975), 422 U.S. 590, 600, 95 S.Ct. 2254, 2260, 45 L.Ed.2d 416, 425.) The length of the defendant's confinement, the lack of food and denial of sleeping accommodations would all tend to suggest that the statements and consents were derived from the exploitation of the defendant's illegal arrest.

In this bicentennial year, it is important to remember that the protections granted all of us under the Bill of Rights would be a dead letter if not enforced by the courts and respected by those charged with enforcing our criminal laws. The prohibitions against unlawful searches and seizures and against coerced self-incrimination are extremely important. They are not meaningless roadblocks thrown in the path of the police. Unless and until this court gives a strong signal that it will not tolerate such illegal activity, the police may continue to ignore the clear letter of the law. The majority's silence with respect to the absence of a warrant in this case does not give such a signal.

Justice SIMON, dissenting:

I dissent because the constitutional requirements for a showing of probable cause have not been satisfied here. Instead, the majority's rationale introduces to Illinois an innovative concept of appellate review. In determining whether there has been a showing of probable cause, reviewing justices may now speculate as to what they would have done had they been the investigating officers, leaving for defendants the task of proving that the real-life police did otherwise. That type of review makes it easier to justify a warrantless arrest than it is to obtain an arrest warrant: for a warrant to issue the State must allege sufficient facts to establish probable cause, while in the case of a warrantless arrest such facts may, under the majority's sanction, merely be presumed. To avoid discouraging the use of arrest warrants, however, the Supreme Court has said that the standards applicable to judging warrantless arrests must be "at least as stringent as the standards applied with respect to the magistrate's assessment." (*Whiteley v. Warden* (1971), 401 U.S. 560, 566, 91 S.Ct. 1031, 1036, 28 L.Ed.2d 306, 312.) The

majority's standard of review is irreconcilable with that admonition.

Disregarding the State's admission during oral argument before this court that "it is not in the record what police officer[s] actually knew at the time [they] arrested the defendant," the majority substitutes as a basis for its decision what the officers might have known. It thus ignores the fundamental rule of warrantless arrests, that the existence of probable cause must be proved by facts within the arresting officers' knowledge at the time the defendant was seized.

"Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." (*Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142, 145; see *People v. Wright* (1968), 41 Ill.2d 170, 174, 242 N.E.2d 180.)

In so doing, the majority rebuffs the previously well-established rule that in cases of warrantless arrest the State carries the burden of establishing probable cause (*People v. Kraman* (1981), 96 Ill.App.3d 390, 51 Ill.Dec. 838, 421 N.E.2d 346; *People v. Moncrief* (1971), 131 Ill.App.2d 770, 268 N.E.2d 717; see *United States v. Allen* (D.C.Cir. 1980), 629 F.2d 51; *United States v. Guana-Sanchez* (7th Cir. 1973), 484 F.2d 590; *State v. Edwards* (1974), 111 Ariz. 357, 529 P.2d 1174; *People v. Tufts* (Colo.1986), 717 P.2d 485; *Palmigiano v. Mullen* (1977), 119 R.I. 363, 377 A.2d 242; *Roberts v. State* (Tex.Crim.App.1977), 545 S.W.2d 157), and it requires defendants to produce evidence in the trial court to disprove a theory of probable cause which is only revealed after resolution by the reviewing court.

The defendant claims that there was no probable cause for his arrest because all that the arresting officers knew at the time of his arrest was that the defendant had been in the company of another man who used Mr. Keena's (the victim's) checks to purchase clothing. The trial court found from one of the arresting officer's misleading testimony (that the defendant was "involved" in using the stolen check) that the defendant passed Mr. Keena's check; but Derrick Moore, assistant sales manager at the Different Circle, contradicted that officer's testimony. (The other arresting officer's testimony contained no additional information tending to establish probable cause.) Moore testified at trial that the defendant came into his store with two other men, and that the defendant browsed through clothing while one of the other two made the purchase at issue. Moore's testimony has been accepted by the State as an accurate account; thus the State now agrees that prior to the defendant's arrest there was no reason to believe that he had made a purchase with, or engaged in a transaction concerning, the victim's check.

According to the majority, however, the defendant mischaracterizes the issue because the police had "other significant information" (116 Ill.2d at 485- 86, 108 Ill.Dec. at 401, 508 N.E.2d at 712) tending to establish probable cause. First, the majority finds significance in Moore's identification of the defendant after viewing some 200 photographs and in Moore's description of a scar which the identifying photograph did not depict. True, that information bolsters the certainty of Moore's identification, so the court is able to conclude with greater assurance that the defendant was the man whom Moore observed in his store while somebody else made a purchase with the victim's check. But the defendant has never contested the sufficiency of Moore's identification. Whether the defendant's presence alone provides probable cause is the question presented, a question for which the certainty of Moore's identification is hardly "significant."

The crux of the majority opinion is not what the police could infer from Moore's identification, but what they might make of the identifying photograph. From the existence of defendant's mug shot the majority reaches for a conclusion which the record does not support: that the police were aware of the defendant's earlier burglary convictions. The majority opinion first states—without support in the record—that from the mug shot police could locate defendant's "rap sheet" between the time that Moore identified the defendant's picture and the time of the defendant's arrest. Next it presumes—also without benefit of evidence—that since police officers could review the defendant's criminal history, they in fact did so. "It is apparent that the police, from the defendant's mug shot * * *, *were able* to examine the Chicago police department reports regarding the defendant and could ascertain his record and address * * * and that from the mug shot [the arresting officers] *ascertained* the information appearing in the Chicago police department records regarding the defendant." (Emphasis added.) 116 Ill.2d at 487, 108 Ill.Dec. at 402, 508 N.E.2d at 713.

In this manner the majority conjures up additional evidence to support a conclusion which the known facts do not. But the illusion is transparent, particularly as the majority calls upon two equally flawed assumptions to detract from the absence of any supportive evidence.

The first is that police arrested the defendant at the address supplied on his rap sheet, thereby demonstrating that they had read the rap sheet and were familiar with its contents and the defendant's criminal conduct recounted therein. In its brief the State claims: "The last entry on this document [defendant's criminal history] lists defendant's address at 5523 North Kenmore, which is exactly where the police went to arrest defendant." Accepting the State's crude misstatement of the record, the majority reasons: the police were able to ascertain the defendant's address from his record, and

"[t]hus, they were able to arrest him at his apartment at 5523 North Kenmore Avenue in Chicago." 116 Ill.2d at 487, 108 Ill.Dec. at 402, 508 N.E.2d at 713.

The flaw in this reasoning is that prior to the defendant's arrest for this crime, his record did not indicate an address on Kenmore Avenue, so the officers' knowledge of defendant's address does not by inference or in any other way establish their knowledge of his burglary record. The defendant's criminal history (appended to this dissent as it appears in the record) indicates for all entries save the last an address of "1230 W. Argyle." The last entry does indicate "5523 N. Kenmore," but what the State's argument and majority opinion have overlooked is that *the last entry was made in connection with the arrest at issue in this case.*

The second assumption is that because one of the arresting officers testified to having written a police report regarding Moore's identification prior to the defendant's arrest, "[h]e *certainly* would have examined the Chicago police department records of the defendant." (Emphasis added.) (116 Ill.2d at 487, 108 Ill.Dec.at 402, 508 N.E.2d at 713.) That presumption is also baseless. The fact that a report was written about the identification proves nothing itself; its relevance to the question of what the arresting officers knew can only be uncovered by knowing what information the report contains. Since the State never offered the report in evidence, an inference arises that its contents are not beneficial to the prosecution. See *Massa v. Department of Registration & Education* (1987), 116 Ill.2d 376, 386, 107 Ill.Dec. 661, 507 N.E.2d 814.

By stating that police officers would "certainly" examine the defendant's criminal history, the majority imagines what an experienced detective would investigate and that detectives in this case performed their investigation in accordance with the majority's hypothetical standard. Considering

the arresting officer's own lack of precision in testifying as to the defendant's "involvement" in using the victim's traveler's checks, and the extent to which that imprecision has been the cause of this protracted search for probable cause, there is no reason to blindly rely upon the unproved assumption that he took care to examine the defendant's criminal record before making his arrest. More disturbing, however, is the implication that in every future case the court will assume that the actual investigation was a model of good police work, and since unlawful arrests are inconsistent with good police work, probable cause must exist.

Contrary to the majority's opinion, the record here suggests that prior to the defendant's arrest, the arresting officers knew that the victim had been murdered sometime on the 11th or 12th of February, that one of the victim's traveler's checks had been used on February 11 to purchase merchandise from the Different Circle store in Chicago, that the defendant had been identified as one of two individuals who accompanied a third man to the Different Circle when the third man passed that check, but nothing more. Derrick Moore described those three men to police, but other than the identification of the defendant the record does not indicate what descriptions Moore gave, their depth of detail, or whether the victim matched Moore's description of the man who actually used the traveler's check. Therefore, from what the record shows to have been within the arresting officers' knowledge at the time of the defendant's arrest, the victim himself might have been alive and in the company of the defendant at the Different Circle store, only to be murdered later that night in an unrelated occurrence.

Even stepping beyond the evidence of record to presume that Moore's initial description of the person who negotiated the victim's traveler's check excluded that possibility, all that the arresting officers knew was that the defendant had been in the company of a man for whom prob-

able cause to arrest existed by virtue of his possession of the victim's property. That information was insufficient to justify the defendant's arrest; "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause" for his arrest. (*Ybarra v. Illinois* (1979), 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238, 245; *Sibron v. New York* (1968), 392 U.S. 40, 62-63, 88 S.Ct. 1889, 1902-03, 20 L.Ed.2d 917, 934-35.) From what the officers knew prior to his arrest, the defendant's conduct was, like that of the appellant in *United States v. Di Re* (1948), 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210, insufficient to justify an arrest because his mere presence while the check was negotiated did not establish his connection to any crime.

"The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hideout but in broad daylight, in plain sight of passers-by, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit." 332 U.S. 581, 593, 68 S.Ct. 222, 228, 92 L.Ed. 210, 219-20.

Notwithstanding the majority's attempt to bolster the record with presumptions of good police work, the evidence supports but a single conclusion: that the defendant was arrested solely for having been in the company of another who possessed and used the victim's property. The case is thus similar to *People v. Creach* (1980), 79 Ill.2d 96, 37 Ill.Dec. 338, 402 N.E.2d 228, where this court found probable cause lacking for the arrest of Thomas Ruppert. Though he had traveled in the victim's car with Creach to Ohio shortly after

the murder, Ruppert's arrest was found to have been made unlawfully, regardless of the legality of Creach's arrest, because "probable cause to arrest a particular individual does not arise merely from the existence of probable cause to arrest another person in the company of that individual." 79 Ill.2d 96, 102-03, 37 Ill.Dec. 338, 402 N.E.2d 228; see *People v. Carnivale* (1975), 61 Ill.2d 57, 329 N.E.2d 193.

The majority appears to distinguish *Creach* on the basis of "other significant information" supposedly known by the arresting officers. Since the record, as I have demonstrated, does not lend support to the majority's rationale, the distinction is invalid, and I do not see how *Creach* can survive the holding in this case. Neither do I believe that the majority opinion is consonant with constitutional safeguards. Moore's identification might have ignited suspicion of the defendant's involvement, but "suspicion is not enough for an officer to lay hands on a citizen." *Henry v. United States* (1959), 361 U.S. 98, 104, 80 S.Ct. 168, 172, 4 L.Ed.2d 134, 139.

There can be little doubt that "guilt by association" is a fallacious notion which can never legitimate an arrest made without other specific information providing probable cause. (*People v. Feltch* (1971), 174 Colo. 383, 387, 483 P.2d 1335, 1337 (an "arrest based upon the theory that birds of a feather flock together, cannot be sustained"); *Smith v. State* (Okla.Crim.App.1974), 525 P.2d 1251, 1253.) The majority is in apparent agreement, finding it necessary to draw upon matters not of record to uphold the legality of the defendant's arrest, but the majority never explains whether or why "propinquity" plus supposed knowledge of prior convictions forms probable cause.

The prosecutors were given ample opportunity to offer evidence in the trial court supporting the legality of the defendant's arrest, and misleading testimony by the arresting

officers was the best they could produce. That deception revealed, the majority's opinion tries to uphold the arrest by its own sleight of hand. It succeeds, but only to a degree. Although the arrest has been approved, it has not been legitimated.

APPENDIX D

Appellate Court of Illinois,

First District, Fourth Division.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

William CABRERA, Defendant-Appellant.

No. 83-1293.

June 20, 1985.

Rehearing Denied July 24, 1985

JOHNSON, Justice:

In a jury trial in the circuit court of Cook County, William Cabrera, defendant, was found guilty of murder, burglary, and robbery. He was sentenced to a term of 60 years for murder and to a term of 14 years for burglary and robbery, the sentences to run concurrently. On appeal, defendant argues that (1) he was denied a fair trial and an impartial jury; (2) the trial court's findings that the arresting officers had probable cause to arrest him is manifestly erroneous; (3) the trial court abused its discretion in giving him extended sentences for the convictions; (4) the 60-year sentence for murder is excessive; and (5) the State failed to prove beyond a reasonable doubt that he had a specific intent to commit a burglary.

We affirm as modified.

The facts reveal that on the night of February 10, 1981, at approximately 11:30 p.m., defendant Caberera and

Ruben Lopez, his accomplice, gained unauthorized entry, through a window, into the offices of the Assyrian National Foundation, located at 1475 West Balmoral Avenue, in Chicago. Once inside the building, defendant stole money from the foundation and killed a man by strangling him and hitting him with a blunt instrument. Before leaving the premises, defendant and Lopez robbed the victim of traveler's checks. Several days later, defendant, with two other persons, went to the Century Mall in Chicago. While there, one of the individuals who accompanied defendant purchased clothes and paid for them with the stolen traveler's checks.

On February 23, 1981, police detectives Sappanos and Keane went to the Century Mall and interviewed Derrick Moore, the owner of the store where the stolen traveler's checks had been used. Moore informed the officers that he remembered the men who had used the checks. Moore viewed police department photographs and identified defendant as one of the persons who was with the individual who bought merchandise with the traveler's checks. Detectives Sappanos and Keane went to defendant's house the next day and arrested him for murder. The officers did not have an arrest warrant. Defendant consented to a search of his house. Prior to trial, defendant moved to quash his arrest and to suppress the evidence recovered, alleging there was no probable cause to arrest him. The trial court denied his motion, finding there was probable cause to arrest defendant.

Defendant argues that he was denied his right to a fair trial and an impartial jury when, after the verdict, the first juror polled by the trial judge indicated possible dissent from the verdict and the trial court failed to inquire as to that dissent. The following colloquy occurred:

> "THE COURT: Is it your desire to have the jury polled, Mr. Lyster?

MR. LYSTER [counsel for defendant]: Yes.

THE COURT: I'm going to ask you this question, and I want you to pay attention to it.

Was this and is this now your verdict, Miss Cancinelli [*sic*]?

MS. CANCINELLI [*sic*] [juror]: Can I say what I have to say, or do I have to give a yes, or no answer?

THE COURT: I want a yes or no answer.

Was this and is this now your verdict?

MS. CANCINELLI [*sic*]: I found in my own person mind—

THE COURT: I said I want a yes or no answer.

Was this and is this now your verdict?

MS. CANCINELLI [*sic*]: Yes."

A defendant in a criminal case is guaranteed a trial by an impartial jury. (U.S. Const. Amend. VI; Ill. Const.1970, art. 1, § 8; *Irvin v. Dowd* (1961), 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751.) Essential to that guarantee is the requirement that the verdict reached be freely arrived at by each juror. (*Martin v. Morelock* (1863), 32 Ill. 485, 488.) Defendant's right to individually poll jurors after a verdict is one method of safeguarding defendant's right to be tried by an impartial jury. (*People v. DeStefano* (1965), 64 Ill.App.2d 389, 408, 212 N.E.2d 357, 367.) Defendant argues that *People v. Kellogg* (1979), 77 Ill.2d 524, 34 Ill.Dec. 163, 397 N.E.2d 835, and *People ex rel. Paul v. Harvey* (1972), 9 Ill.App.3d 209, 292 N.E.2d 124, are controlling on the issue

of juror dissent. He complains that the holding and reasoning of both cases require a reversal of his murder conviction.

In *Kellogg*, the jurors were polled and each juror was asked, "Was this then and is this now your verdict?" Eleven jurors replied, "Yes." The following colloquy occurred between the court and the remaining juror:

> "'THE COURT: Susan M. Vesecky, was this then and is this now your verdict?
>
> JUROR VESECKY: Yes. Can I change my vote?
>
> THE COURT: The question is, was this then and is this now your verdict?
>
> JUROR VESECKY: (No response.)
>
> THE COURT: Was this then and is this now your verdict?
>
> JUROR VESECKY: Yes, Sir.'" (77 Ill.2d 524, 527, 34 Ill.Dec. 163, 397 N.E.2d 835.)

The court held there was nothing wrong with the double-barrel question used in the colloquy, "Was this then and is this now your verdict;" nevertheless, it held if a juror indicates some hesitancy or ambivalence in his answer, it is the trial judge's duty to ascertain the juror's present intent by affording the juror the opportunity to make an unambiguous reply as to his present state of mind. (77 Ill.2d 524, 528, 34 Ill.Dec. 163, 397 N.E.2d 835.) The court reversed defendant's conviction in *Kellogg* because the trial court failed to follow this duty.

In *People ex rel. Paul v. Harvey* (1972), 9 Ill.App.3d 209, 210, 292 N.E.2d 124, 125-26, the following colloquy occurred at trial between the court and a juror during polling:

" 'THE COURT: Is this and was this your verdict?

JUROR: Well, it wasn't exactly, no.

THE COURT: Did you sign this?

JUROR: Yes, I did.

THE COURT: Then it's your verdict.'"

The court held that the juror indicated possible dissent, and the trial court, therefore, had a duty to inquire as to that dissent. *Harvey*, at 212, 292 N.E.2d 124.

Defendant's case is distinguishable from *Kellogg* and *Harvey* because, unlike the jurors in those cases, Ms. Ciancanelli did not indicate ambivalence or hesitancy in her reply. We do not interpret her replies, "Can I say what I have to say or do I have to give a yes, or no answer?" and "I found in my own person mind," as indicating ambivalence or hesitancy in her answer. In *Kellogg* and *Harvey*, it was clear to the reviewing court that the jurors had reservations about their decision. Here, Ms. Ciancanelli never indicated to the trial court that her vote as reached during deliberation did not accurately reflect her decision as to defendant's guilt.

The primary purpose of jury polling is to determine that the jury's verdict accurately reflects each juror's vote as reached during deliberations and that the juror's vote was not the result of force or coercion. (*People v. Williams* (1983), 97 Ill.2d 252, 307, 73 Ill.Dec. 360, 386, 454 N.E.2d 220, 246.) A judge must be careful to determine the juror's present intent in the polling. (*People v. Kellogg* (1979), 77 Ill.2d 524, 529, 34 Ill.Dec. 163, 166, 397 N.E.2d 835, 838.) It is for the trial court to determine whether a juror has freely assented to the verdict. It not only hears the juror's response, it also observes the juror's demeanor and tone of voice. (77

Ill.2d 524, 529, 34 Ill.Dec. 163, 397 N.E.2d 835.) We can only second-guess at this stage on those factors considered by the trial court. We, therefore, conclude that unless it is clear to the reviewing court that a juror indicated possible dissent, we will not reverse on jury dissent grounds. Since Ms. Ciancanelli's response indicated no ambivalence or hesitancy, there was no cause for the judge to further question her as to possible dissent. Thus, we hold the trial court had no duty to inquire as to her possible dissent.

Defendant also contends that a statement given by Ms. Ciancanelli 2 hours after the jurors were dismissed indicates that she wanted to dissent from the verdict and change her vote. A statement which goes to the deliberation process and is taken after the verdict has been read, and the jury has been polled and discharged, is not admissible (*People v. Preston* (1979), 76 Ill.2d 274, 288, 29 Ill.Dec. 96, 103, 391 N.E.2d 359, 366), and therefore not reviewable by this court. Accordingly, after the jurors were discharged, Ms. Ciancanelli's change of mind or claim that she was mistaken or unwilling in her assent to the verdict comes too late. 76 Ill.2d 274, 288, 29 Ill.Dec. 96, 391 N.E.2d 359.

Before trial, defendant motioned the court to quash his arrest for lack of probable cause and to suppress the evidence recovered as a consequence of the illegal arrest. He contends the trial court's findings of probable cause to arrest was manifestly erroneous because it was based entirely on defendant's presence with another person who used traveler's checks stolen from the murder victim.

Probable cause to arrest exists where the facts and circumstances known to the police would justify a man of reasonable caution to believe that a crime has been committed by the individual he intends to arrest. (*People v. Miller* (1980), 91 Ill.App.3d 1031, 1037, 47 Ill.Dec. 533, 538, 415 N.E.2d 538, 543.) It is something less than evidence neces-

sary to result in conviction. (*People v. Frye* (1983), 113 Ill.App.3d 853, 859, 69 Ill.Dec. 630, 634, 447 N.E.2d 1065, 1069.) In determining the existence of probable cause, the courts are concerned with probabilities derived from factual and practical consideration of everyday life by reasonable, prudent men—not legal technicians. *People v. Creach* (1980), 79 Ill.2d 96, 102, 37 Ill.Dec. 338, 341, 402 N.E.2d 228, 231.

The ruling of a trial court regarding a motion to suppress will not be overturned unless it is manifestly erroneous. (*People v. Tribett* (1981), 98 Ill.App.3d 663, 671, 53 Ill.Dec. 897, 903, 424 N.E.2d 688, 694.) In support of his contention that the trial court erred, defendant cites to *People v. Carnivale* (1975), 61 Ill.2d 57, 329 N.E.2d 193, *People v. Lumpp* (1981), 113 Ill.App.3d 694, 69 Ill.Dec. 528, 447 N.E.2d 963, and *People v. Creach* (1980), 79 Ill.2d 96, 37 Ill.Dec. 338, 402 N.E.2d 228. He states that the court in those cases reasoned that probable cause to arrest a person does not arise merely from the presence of that person in the company of another. Even assuming, *arguendo*, that defendant is correct in his reasoning, this case is distinguishable from those cited; here, the arresting officers had more facts available to them than that defendant was merely present with another suspect. In the present case, the officers knew that defendant had been twice convicted of burglary in the past 6 months. Moreover, they knew defendant's past burglaries had occurred in the same general area as the murder and burglary they were investigating, and that defendant lived in the general area where the murder and burglary occurred.

Defendant was arrested at his home after being identified by a store owner as one of three individuals who purchased clothes and paid for them with the victim's traveler's checks. The store owner also told the officers that defendant had a large scar on his neck. With this information and what they knew of defendant's past burglaries in the general area

where the murder and burglary occurred, the officers went to defendant's house without an arrest warrant and placed him under arrest. Based on this information, we hold the trial court's finding of probable cause was not manifestly erroneous.

Defendant complains that he was improperly given an extended sentence for each of the offenses for which he was convicted. He argues that the murder of the victim was not accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.

The trial court may impose an extended term sentence when a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. (Ill.Rev.Stat.1981, ch. 38, par. 1005-5-3.2(b)(2).) When defendant is convicted of several offenses, he may receive an extended sentence for only the most serious class of offenses. *People v. Jordan* (1984), 103 Ill.2d 192, 205, 82 Ill.Dec. 925, 931, 469 N.E.2d 569, 575.

The record indicates the victim's death was caused by strangulation and blows by a blunt instrument. Moreover, the victim's blood was splattered over the interior wall of the building, indicating the blows were vicious. We hold that the trial court correctly found the victim's murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.

Defendant correctly argues that the trial court erred in imposing an extended sentence for his burglary and robbery convictions. Burglary and robbery are Class 2 offenses. Thus, both crimes are of a different class than defendant's murder conviction. The trial court was limited to imposing an extended sentence for the murder conviction only. (*Jordan*, at 205, 82 Ill.Dec. 925, 469 N.E.2d 569.) We therefore

reduce defendant's sentence for burglary and robbery to 7 years.

Defendant next argues that his sentence for the murder conviction was excessive. Determining the appropriate sentence for an offender rests in the sound discretion of the trial court. (*People v. La Pointe* (1982), 88 Ill.2d 482, 492, 59 Ill.Dec. 59, 63, 431 N.E.2d 344, 348.) We will not alter the trial court's sentence absent an abuse of discretion. (*La Pointe*, at 492, 59 Ill.Dec. 59, 431 N.E.2d 344.) Defendant was convicted of murder and had three prior felony convictions. The trial court could have given defendant a sentence of not less than 40 years and not more than 80 years. (Ill.Rev. Stat.1981, ch. 38, par. 1005-8-2(a)(1); Ill.Rev.Stat.1981, ch. 38, par. 1005-5-3.2(b)(1), (2).) Defendant's sentence was less than the maximum sentence he could have received. We hold the trial court did not abuse its discretion in sentencing defendant to 60 years for the murder conviction.

Lastly, defendant argues that the State failed to prove beyond a reasonable doubt that he had the specific intent to commit burglary. Section 19-1(a) of the Criminal Code (Ill.Rev.Stat.1981, ch. 38, par. 19- 1(a)) provides, in pertinent part, that "A person commits burglary when without authority he knowingly enters * * * a building * * * with intent to commit therein a felony or theft." Proof of an unlawful breaking and entering in the absence of inconsistent circumstances is sufficient to infer the intent to commit a theft. (*People v. Toolate* (1984), 101 Ill.2d 301, 308, 78 Ill.Dec. 153, 156, 461 N.E.2d 987, 990.) Intent is a state of mind which can be inferred from surrounding circumstances. (*People v. Richardson* (1984), 104 Ill.2d 8, 13, 83 Ill.Dec. 604, 606, 470 N.E.2d 1024, 1026.) Here, defendant confessed that without authorization he entered the building to steal valuables and money. Moreover, testimony revealed he cashed traveler's checks taken from the victim. We hold the

evidence and surrounding circumstances were sufficient for the jury to infer the requisite intent.

Accordingly, defendant's convictions for murder, burglary, and robbery are affirmed. His sentence for burglary and robbery is reduced to 7 years and is to run concurrently with his 60-year sentence for murder.

Affirmed as modified.

JIGANTI, P.J., and LINN, J., concur.

APPENDIX E

IN THE CIRCUIT COURT
OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

WILLIAM CABRERA,	)	
	)	
Petitioner-Defendant,	)	Criminal
vs	)	Case No. 81 I 2442
	)	
THE PEOPLE OF THE	)	Charge: Murder
STATE OF ILLINOIS,	)	Thursday, March 17, 1983
Respondent-Plaintiff.	)	at 1:30 o'clock p.m.

Court convened pursuant to adjournment.

APPEARANCES:

MR. ROBERT RAAB and
MR. BRIAN BARNETT,
Assistant State's Attorneys,
for the Respondent-Plaintiff.

MR. TODD LYSTER,
For the Petitioner-Defendant.

CLERK: The People of the State of Illinois versus William Cabrera.

THE COURT: You may all have a seat.

I'm going to rule on the Motion to Suppress Arrest.

The law is that an officer may arrest a person without a warrant if he has reasonable grounds to believe the person is committing or has committed an offense, Chapter 38 Section 107-2C.

An examination of the evidence presented shows that the police began investigating this matter on 2-12-81, and during that investigation discovered the following information: 1) That Yoel Akeena was murdered by strangulation and blunt trauma.

2) Traveler's checks belonging to the deceases were cashed after his death.

3) That the salesman made a photoidentification of the Defendant as being the person that passed the Traveler's checks belonging to the deceased on 2-23-81 and told the police the picture was the same but the person that actually passed the checks had a big scar on his neck.

4) Police went to the Defendant's apartment on 2-23-81 and the Defendant was not home. The police talked to a woman manager of the building or someone in charge of maintenance, a woman or something of that sort. They did not attempt entry into the apartment, at that time.

On 2-24-81 the police were notified by the woman manager that the Defendant was home in the apartment.

6) The police immediately go to the apartment. The Defendant opens the door clad in gym trunks. The police observed a scar on his neck and arrested the Defendant without a warrant.

Clearly probably cause for the arrest of the Defendant was present.

Now the expectation of privacy in a private home is protected by the Fourth Amendment and warrantless entry without consent may effectuate an arrest and may be justified only in exigent circumstances.

In determining whether entering into a private dwelling is reasonable based on the facts and circumstances known to the officers at the time they acted, cases have held a variety of factors should be considered by the Court in arriving at a determination as to whether exigent circumstances exist. These cases I have reviewed and the factors include the factors such as whether a grave offense exist particularly a crime of violence; whether the suspect can be believed to be armed or had exhibited signs of violence which give rise to a clear showing of probable cause.

4) A strong reason to believe the suspect is in the premises being entered.

5) A likelihood of escape of the suspect.

6) Whether the entry is forceful or peaceful.

7) The time of the day or night of the entry.

Now, I would point out that whether the police had time to obtain a warrant is important but it is not necessarily controlling in this matter. Cases have held that in the past, People vs. Davis held that the test is not whether it was reasonable to procure a warrant but whether the search and seizure was reasonable. The evil that is repugnant to the Constitution of the United States and the Constitution of Illinois is the unauthorized entry into a home to effect a warrantless arrest.

There is still the question that a line of cases following Payton deal with traumatic forceful entry into homes.

Now the testimony at the hearing shows two versions, the Defendant's version that he was in the bathtub when the police officer's arrived in his bathroom and the version of the police officer testifying that they knocked on the door, he announced his office, asked the Defendant if he could come in and the Defendant acquiesced in that.

Now, in reviewing the factors that are present in this case, first off a grave offense did exist here, a crime of violence, a crime of murder. Whether the suspect could be believed to be armed or had exhibited signs of violence, that is present, blunt trauma and strangulation, cause of death.

Whether probable cause existed, a clear showing of probable cause, that is the standard. There is no doubt a clear showing of probable cause existed. There is strong reason to believe the suspect was in the premises being entered, that was present. The clerk or the manager had called the police and said the Defendant is home. He is in the apartment.

The likelihood of escape was suspect – nothing there at all. We know nothing about that likelihood.

Whether entry is forceful or peaceful. The evidence here indicates the entry was peaceful. I would note that the police did not attempt to enter the apartment on the 23rd when they went to the Defendant's house.

Now the Court is able to take into consideration inferences from testimony. I do recall specifically the officer testifying that on the 23rd he went to the Defendant's house to arrest him. I recall that specifically. I recall that he said he went there on the 24th to arrest him. How, that is the crux of the problem in this case, as to whether that intervening 24 hour period gave rise to these officers to get a warrant.

The Court heard the testimony in light of everything else that the witness, that he was identified, the picture of the Defendant. The witness said this is the person but he has a big scar on his neck and not until the 24th when the police en-

tered that apartment and saw the Defendant standing in his gym trunks did they have absolute confirmation that this was the individual that the witness at the store had identified.

I cannot believe the Defendant's testimony that he was in the bathroom, at the time. Therefore, it is clear to the Court that exigent circumstances existed and accordingly the arrest of the Defendant without a warrant is constitutional, reasonable.

Motion to Suppress the Arrest is denied.

Are you ready to proceed on the Motion to Suppress the Confession?

MR. RAAB: We are ready, your Honor.

MR. LYSTER: We are ready.

MR. RAAB: The State would call Officer Sappanos.

(Witness duly sworn).

DETECTIVE THOMAS SAPPANOS, called as a witness on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. RAAB:

Q. Mr. Witness, would you please state your name and spell your last name.

A. Detective Thomas Sappanos; S-a-p-p-a-n-o-s.

Q. By whom are you employed?

A. Chicago Police Department.

Q. What is your assignment?

A. I am assigned as a detective to Area 6 violent

They should have had an arrest warrant, they should have investigated the evidence during the two following seizures and let the State proceed with whatever case they have in this matter without those items.

Thank you.

MR. BARNETT: May I make a few comments?

MR. LYSTER: Judge, do we get over 20 minutes?

THE COURT: Sit down. I have heard the evidence and I have had the opportunity to assess the credibility of the witnesses during the numerous days of testimony that we have heard and in reviewing that testimony and in listening to the witnesses testify I do wish to make a few comments about the credibility of some of the witnesses.

There are here before the Court totally different stories. One story told by the defendant was substantiated in small part by the witness that he called, an ex-girlfriend, a woman that was living with him at the time when this incident occurred. The other story, a story told by a large number of professional police officers, much comment was made about the number of people that testified for the State's case. The Court is aware and is of the opinion that part of that was because of the vague allegations made in the motion to suppress and this Court's willingness to give the defense every opportunity to prove those allegations.

The Court listened to Mr. Cabrera and I watched Mr. Cabrera testify and Mr. Cabrera told this Court a story that if believed would indicate that he was tortured for some 37 hours, numerous slappings, hittings in the stomach, the back, the face, stranglings by these police officers. He also testified that he was not given anything to eat during the entire time nor to drink and he went to the washroom one time. That testimony was refuted by another – by police officers who testified that they did give him food, they did give him something to drink, that he was taken to the washroom. Mr. Cabrera's story was corroborated somewhat by Mrs. Lopez, the young lady who came here and shed some light on what may have occurred to substantiate Mr. Cabrera's testimony. Now, Mrs. Lopez testified as to a

number of things. The police testified as to a number of things. If Ms. Lopez is to be believed then Officer Grogman is not to be believed. Detective Grogman. She testified that she was in the car with two officers and they returned to the police station. Now, I heard a lot of testimony. All of it cannot be true. It is the Court's job to watch people, to listen to what they say and to determine in the Court's mind whether or not a truthful story is being elicited. One of the items that did disturb me from the very beginning was the length of time that the defendant was in custody before the statement was taken. But that is only one of the factors that the State has to consider as to whether or not a statement is voluntary or that actions during that period of time are voluntary.

Now, I heard a lot of testimony concerning the consent to search, the statement that was given by the defendant and I find that, as Mr. Lyster pointed out to the Court, that a search warrant should be obtained. I find that the defendant voluntarily executed a consent to search. I further find that and the Court is of this opinion, in assessing the credibility of the witnesses, watching them on the stand and listening to their stories that this length of time was somewhat facilitated by this defendant. I believe that he agreed to cooperate, to take the lie detector test. I believe that he told the police one thing, that he went and showed them where Ruben Lopez lived and in short I find that the defendant's story that he told here yesterday on this witness stand for some two hours to be totally unbelievable. The evidence admitted, the picture Exhibit 1B shows absolutely no marks on that defendant's neck or face nor does he look like a person who has been abused. Now, I realize that pictures make things look better than they actually are sometimes. However, that's just one little piece of evidence that I have heard.

Therefore, based upon all the things that I have said previously, I am denying both the Motion to Suppress Evidence and the Motion to Suppress Confession.

Now, are there any other pending motions?

MR. BARNETT: Not that I am aware of, Judge.

* * *